STATE OF MICHIGAN
IN THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL FROM
THE MICHIGAN COURT OF APPEALS

(Before: Owens, PJ, and Jansen and Murray, JJ)

BARUCH SLS, INC.,

Petitioner-Appellant,

v

TOWNSHIP OF TITTABAWASSEE,

Respondent-Appellee.

Supreme Court No. 152047
Court of Appeals No. 319953
MTT Docket Nos. 0395010, 0415093

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AMICUS CURIAE PARTIES' BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

FILED ON BEHALF OF
THE MICHIGAN TOWNSHIPS ASSOCIATION,
THE MICHIGAN MUNICIPAL LEAGUE,
THE MICHIGAN ASSOCIATION OF COUNTIES,
THE MICHIGAN ASSOCIATION OF SCHOOL BOARDS, AND
THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN

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Dated: July 26, 2016

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STATEMENT OF INTERESTS OF AMICUS CURIAE

1. Michigan Townships Association

The Michigan Townships Association is a Michigan non-profit corporation whose members, consisting of over 1,230 townships within the State of Michigan (including both general law and charter townships), have joined together for the purpose of providing education, information, and guidance to and among township officials to enhance the efficient and knowledgeable administration of township government services under the laws and statutes of the State of Michigan.

The Board of Directors of the Michigan Townships Association has authorized and directed the undersigned law firm to file an Amicus Curiae Brief on behalf of the Michigan Township Association in opposition to Appellant's Application for Leave to Appeal.

2. Michigan Municipal League

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This Amicus Curiae Brief is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, city attorney, Kalamazoo; John C. Schrier, city attorney, Muskegon; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; James O.

Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; and William C. Mathewson, general counsel, Michigan Municipal League.

3. Michigan Association of Counties

The Michigan Association of Counties ("MAC") is a non-partisan, non-profit organization which advances education, communication and cooperation among county government officials in the state of Michigan. The MAC is the counties' voice at the State Capitol, providing legislative support on key issues affecting counties. Its membership is comprised of 81 of Michigan's 83 counties, with platforms created through the actions of the MAC's Board of Directors, who represent the member counties in issues of statewide significance.

4. Michigan Association of School Boards

The Michigan Association of School Boards ("MASB") is a voluntary, non-profit association consisting of approximately 600 local and intermediate school district boards of education throughout the State of Michigan, which includes nearly all of the state's public school districts. Officially organized in 1949, MASB's goal is to advance the quality of public education in the state, promote high educational program standards, help school board members keep informed about education issues, represent the interest of boards of education, and promote public understanding about school boards and citizen involvement in schools.

MASB is recognized as a major voice in influencing education issues at the state level and, through its affiliation with the National School Boards Association, at the national level. Consequently, for more than 65 years, MASB has worked to provide quality educational

leadership services for Michigan Boards of Education and to advocate for student achievement and public education.

5. Public Corporation Law Section

The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law.

The Public Corporation Law Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Public Corporation Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous Amicus Curiae briefs in state and federal courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this Amicus Curiae Brief was authorized at a July 6, 2016 special meeting of the Council held in accordance with Section 6.2.3 and Section 6.2.5 of the Council's Bylaws. A quorum of the Council was present at the meeting (17 members), and the motion passed unanimously, 16-0, with one abstention. The position expressed in this Amicus Curiae Brief is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

STATEMENT OF JUDGMENT APPEALED FROM

Petitioner-Appellant, Baruch SLS, Inc. ("Appellant" or "Baruch SLS"), filed an Application for Leave to Appeal to this Court, seeking review of an unpublished *per curiam* opinion of the Court of Appeals dated April 21, 2015. The Court of Appeals' opinion affirmed the Michigan Tax Tribunal's decision to deny a property tax exemption to Appellant because it concluded that Appellant was not a "charitable institution" under MCL 211.7o or MCL 211.9.

In an Order dated April 1, 2016, this Court directed the Clerk to schedule oral argument on the Application, and it instructed the parties to file supplemental briefs addressing the following issues:

(1) whether *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), correctly held that an institution does not qualify as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis";

(2) if so, how "discriminatory basis" should be given proper meaning;

(3) the extent to which the relationship between an institution's written policies and its actual distribution of charitable resources is relevant to that definition; and

(4) whether, given the foregoing, the petitioner is entitled to a tax exemption.

The parties have filed their supplemental briefs. The amicus parties submitting this Amicus Curiae Brief are the Michigan Townships Association, the Michigan Municipal League, the Michigan Association of Counties, the Michigan Association of School Boards, and the Public Corporation Law Section of the State Bar of Michigan (collectively, the "Amicus Parties"). This Amicus Curiae Brief is submitted in support of Appellee, the Township of Tittabawassee ("Appellee" or "Township"). For the reasons set forth in this Brief, the Amicus Parties request that this Court **deny** Appellant's Application for Leave to Appeal.

QUESTIONS PRESENTED

I. Did *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), correctly hold that a taxpayer does not qualify for a property tax exemption as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis"?

Appellant, Baruch SLS, answers:	Yes.
Appellee, the Township, answers:	Yes.
The Michigan Tax Tribunal would answer:	Yes.
The Court of Appeals would answer:	Yes.
These Amicus Parties answer:	Yes.

II. Did the Michigan Tax Tribunal and Michigan Court of Appeals correctly interpret *Wexford Medical Group* when they held that Appellant does not qualify as a "charitable institution" because it does not offer charity to any person who needs the type of charity being offered, but rather offers charity only to the residents of its senior living facility?

Appellant, Baruch SLS, answers:	No.
Appellee, the Township, answers:	Yes.
The Michigan Tax Tribunal would answer:	Yes.
The Court of Appeals would answer:	Yes.
These Amicus Parties answer:	Yes.

INTRODUCTION

This case asks whether a taxpayer may receive a property tax exemption as a "charitable institution" if the taxpayer discriminates among the people who receive the benefit of its "charity." This Court has already answered – correctly – in the negative:

> **A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services.** Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> * * *
>
> [A] charitable institution can exist to serve a particular group or type of person, **but the charitable institution cannot discriminate within that group.**

Wexford Medical Group v City of Cadillac, 474 Mich 192, 213-15; 713 NW2d 734 (2006).

The parties and amicus participants agree that *Wexford Medical Group* was correctly decided and that a charitable institution cannot discriminate within the group of people who need the type of charity being offered. But the parties disagree as to what it means to "discriminate."

These Amicus Parties submit that a taxpayer offers charity on a "discriminatory basis" if it does not "serve any person who needs the particular type of charity being offered" – meaning that a charitable institution must offer charity *on equal terms* to those who need the charitable benefits. A charity cannot "hand-pick" which individuals "deserve the services," nor can it prefer some individuals over others on subjective grounds. **A charity should open its doors to anyone in need, and not build such a narrow door that only a select few can enter.**

Appellant's case presents a prime example of such discrimination. Appellant, which operates a senior living facility, offers financial assistance only to individuals who have already paid to become residents of the facility; it does not offer any assistance to applicants who are not already residents. The Michigan Tax Tribunal and the Court of Appeals correctly held that

Appellant does not qualify as a charitable institution because it does not offer charity to "an indefinite number of persons" and instead provides charity on a "discriminatory basis." By limiting its "charity" to its current residents, Appellant does not "serve[] any person who needs the particular type of charity being offered," as required under *Wexford Medical Group* and the decades of case law on which *Wexford* was based. *Wexford Medical Group*, 474 Mich at 215.

The "discriminatory basis" factor of the *Wexford Medical Group* test necessarily requires a fact-intensive analysis that must be performed on a case-by-case basis. This factor, as it has been interpreted by the lower courts, is legally correct, practically workable, and consistent with the widely accepted definition of "charity."

Appellant and its supporting amicus party, Chelsea Health & Wellness Foundation ("CWF"), propose a starkly different interpretation. They ask this Court to read *Wexford Medical Group* as allowing a charitable institution to discriminate against anyone, and to impose onerous burdens on low-income individuals, so long as the discrimination is not based on race, sex, or other protected classes. Such a limited reading of "discrimination" is not supported by *Wexford Medical Group*, and it makes little sense, given that discrimination based on membership in a protected class is already prohibited by law and therefore would not need to be separately articulated in this Court's test for charitable institutions.

Additionally, CWF takes the extraordinary position that charities should be allowed to discriminate against the poor. *See* CWF Amicus Brief, p. 18 ("the poor should not be a subclass of those against which a charity may not discriminate under Factor 3"). CWF makes this argument to protect its own litigation position in a different property tax appeal, wherein CWF purportedly bestows "charity" by charging a reduced rate ($92.50 per month instead of the usual $185 per month for a family of four) to use its $10 million fitness facility, but imposes additional

requirements for the low-income individuals who pay the reduced rate. CWF's interpretation is plainly contrary to *Wexford Medical Group* and the spirit of the charitable institution exemption.

This Court has already established a workable test for evaluating "charitable institution" exemptions, and the new interpretations proposed by Appellant and CWF are legally unsupported and would lead to fundamentally unjust results. Moreover, Appellant in this case is not entitled to an exemption because it does not offer charity to anyone who in need, but rather restricts benefits to its current residents – which is incompatible with the definition of "charity." The Amicus Parties therefore request that this Court deny Appellant's Application for Leave to Appeal and allow *Wexford Medical Group* to stand undisturbed.

STATEMENT OF FACTS

The Amicus Parties incorporate by reference the Statement of Facts in the Answer to Application for Leave to Appeal and the Supplemental Brief filed by Respondent/Appellee, Township of Tittabawassee, as well as the factual recitation provided in the Court of Appeals Opinion (No. 319953).

ARGUMENT

I. Standard of Review

Appellant seeks leave to appeal from a decision of the Michigan Tax Tribunal denying Appellant's request for a property tax exemption. This Court's review of the Tribunal's decision is "limited to the questions of whether the [T]ribunal committed an error of law or adopted a wrong legal principle." *Teledyne Continental Motors v Muskegon Tp*, 145 Mich App 749, 753; 378 NW2d 590 (1985). Under this "very limited" appellate review, "[f]actual findings made by the tribunal will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record." *Walgreen Co v Macomb Tp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "Substantial" evidence is "more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-53; 483 NW2d 416 (1992).

The scope of this Court's review is also impacted by the well-established rule that tax exemptions are "narrowly construed" in favor of taxing authorities because exemptions "upset the desirable balance achieved by equal taxation[.]" *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 204; 713 NW2d 734 (2006); *see also Association of Little Friends, Inc v City of Escanaba*, 138 Mich App 302, 307; 360 NW2d 602 (1985) ("[e]xemption statutes are to be strictly construed in favor of the taxing unit").

Tax exemptions are generally "disfavored" and are in "derogation of the principle that all shall bear a proportionate share of the tax burden." *GMAC LLC v Treasury Dep't*, 286 Mich App 365, 375; 781 NW2d 310 (2009). Accordingly, the party seeking the exemption bears the burden of establishing that all requirements for an exemption have been satisfied. *Chauncey and Marion Deering McCormick Foundation v Wawatam Tp*, 196 Mich App 179, 182; 492 NW2d 751 (1992).

Under this limited scope of review, in which Appellant bears the heavy burden of showing that it is entitled to an exemption from property taxes, the Amicus Parties submit that Appellant is not entitled to relief from this Court and that its Application should be denied.

II. *Wexford Medical Group* correctly held that an institution is not a "charitable institution" if it discriminates within the group of people that it serves.

This Court's April 1, 2016 Order first asks "whether *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 N.W.2d 734 (2006), correctly held that an institution does not qualify as a 'charitable institution' under MCL 211.7o or MCL 211.9[1] if it offers its charity on a 'discriminatory basis.'" The Amicus Parties submit that *Wexford Medical Group* **was** correctly decided and that its holding should not be disturbed by this Court.

a. *Wexford Medical Group* was correctly decided.

i. Factual Background of Wexford Medical Group

In *Wexford Medical Group*, the petitioner-taxpayer was a nonprofit corporation that provided health care in Wexford County, which was a federally designated health professional shortage area. *Wexford Medical Group*, 474 Mich at 196. The petitioner's stated mission was "providing access to quality and affordable health care services to the communities it serves." *Id.* To that end, the petitioner had a "charity care" policy and an "open-access" policy for Medicare and Medicaid patients, meaning that anyone whose income was less than twice the federal poverty level would receive free or discounted health care services. *Id.* at 197. Patients were served on a first-come, first-served basis, and the petitioner did not limit the number of Medicare and Medicaid patients that it treated. *Id.*

[1] MCL 211.9 is the personal property tax exemption corollary to MCL 211.7o, which provides the real property exemption. Specifically, MCL 211.9 exempts "the personal property of charitable, educational, and scientific institutions incorporated under the laws of this state."

The petitioner sought property tax exemptions under MCL 211.7o (charitable institution exemption for real property) and MCL 211.7r (public health purpose exemption). The local taxing unit denied the exemptions, and the petitioner appealed. This Court ultimately held that the petitioner was entitled to the requested exemptions.

ii. Wexford Medical Group's Historical Review of "Charitable Institutions"

This Court began its analysis with the plain language of MCL 211.7o, which provides as follows:

> Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this act.

MCL 211.7o; *see also Wexford Medical Group*, 474 Mich at 199. This Court explained that a three-part test has been developed through case law to determine whether the statutory requirements for the exemption are satisfied:

> (1) the real estate must be owned and occupied by the exemption claimant;
>
> (2) the exemption claimant must be a nonprofit charitable institution; and
>
> (3) the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated.

Id. at 203. This Court noted that the first and third factors were not at issue, and that the petitioner was indisputably a "nonprofit" organization. *Id.* at 204. The "central inquiry" was "whether petitioner is a 'charitable institution,' and, in a more general sense, what precise meaning that term has." *Id.*

To answer that question, this Court traced the history of the term "charitable institution,' beginning with its earliest reference in *Attorney General v Common Council of Detroit*, 113 Mich 388; 71 NW 632 (1897). In that case, this Court denied an exemption to a masonic temple

association, reasoning that "[i]t is not enough, in order to exempt such associations from taxation, that one of the direct or indirect purposes or results is benevolence, charity, education, or the promotion of science. They must be organized chiefly, if not solely, for one or more of these objects." *Wexford Medical Group*, 474 Mich at 205, *quoting Attorney General*, 113 Mich at 390.

Next, the *Wexford Medical Group* Court turned to a 1904 decision, which held that a hospital was "charitable" where it offered services at reduced rates, reasoning that "a corporation is sufficiently charitable to entitle it to the privileges of the [property tax exemption] act when the charges collected for services are not more than are needed for its successful maintenance." *Mich Sanitarium & Benevolent Ass'n v Battle Creek*, 138 Mich 676; 101 NW 855 (1904). A similar conclusion was reached in *Gundry v R B Smith Memorial Hospital Ass'n*, 293 Mich 36; 291 NW 213 (1940), where a nonprofit hospital was found to be exempt from property taxes where it earned a small profit but reinvested that profit back into the hospital. *See Wexford Medical Group*, 474 Mich at 206-207.

In continuing its historical review, this Court next examined a case involving a petitioner's two nursing homes. *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660; 242 NW2d 749 (1975). In that case, this Court affirmed the denial of an exemption to one nursing home, Hillsdale Terrace, in which residents "paid a substantial up-front sum and monthly fees thereafter." *Id.* at 667; *see also Wexford Medical Group*, 474 Mich at 208. Importantly, the petitioner offered reduced rates to only four of its 72 residents in one year, and waived the fees for only one resident, and those residents were "hand selected by the establishment" after an application process. *Mich Baptist Homes*, 396 Mich at 668-69; *see also Wexford Medical Group*, 474 Mich at 208.

The *Michigan Baptist Homes* Court allowed an exemption for the petitioner's other nursing home, which was funded by an endowment fund and which accepted residents "on the basis of their lack of ability to find care elsewhere, not on the basis of being in good financial and physical health." *Wexford Medical Group*, 474 Mich at 208. In justifying the different results for the two nursing homes, this Court reasoned that the Hillsdale Terrace facility "did not 'serve the elderly generally,' but, rather, 'provide[d] an attractive retirement environment for those among the elderly who have the health to enjoy it and who can afford to pay for it.'" *Mich Baptist Homes*, 396 Mich at 671; *see also Wexford Medical Group*, 474 Mich at 209.

Building on the holding of *Michigan Baptist Homes*, this Court's next examination of the charitable institution exemption was in *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Township*, 416 Mich 340; 330 NW2d 682 (1982). In *Retirement Homes*, this Court emphasized that "to qualify for a charitable or benevolent tax exemption, property must be used in such a way that it 'benefit[s] the general public without restriction.'" *Id.* at 348; *see also Wexford Medical Group*, 474 Mich at 211. This Court then quoted a "widely used definition" of "charity":

> [Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Id. at 348-349, *quoting Jackson v Phillips*, 96 Mass (14 Allen) 539; 14 Allen 539 (1867).

From that definition, the *Retirement Homes* Court framed the inquiry as follows: "Does [the petitioner] operate the apartments in such a way that there is a 'gift' for the benefit of 'the general public without restriction' or 'for the benefit of an indefinite number of persons'?" *Retirement Homes*, 416 Mich at 349. This Court concluded that the exemption should be denied

because there was no "gift"; residents paid a monthly fee, and residents were "chosen on the basis of their good health, their ability to pay the monthly charge, and, generally, their ability to live independently." *Id.* at 349-50; *see also Wexford Medical Group*, 474 Mich at 211-12.

Finally, the *Wexford Medical Group* Court reviewed *Michigan United Conservation Clubs v Lansing*, 423 Mich 661; 378 NW2d 737 (1985), which involved an environmental organization that conducted educational seminars, published information brochures, and engaged in lobbying, among other things. In that case, this Court held that the organization was not a charitable institution because "the petitioner was organized to benefit its paying members rather than to benefit 'the general public without restriction' or 'for the benefit of an indefinite number of persons.'" *Id.* at 673; *see also Wexford Medical Group*, 474 Mich at 212.

iii. *Wexford Medical Group Court's Analysis*

After its review of nearly a century of case law, this Court identified "several common threads," including – relevant in this case – the following:

> A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. **In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds.** This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. **Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group.** The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

Wexford Medical Group, 474 Mich at 213 (emphasis added). This Court then articulated a six-prong test for determining whether a taxpayer is a "charitable institution":

(1) A "charitable institution" must be a nonprofit institution.

(2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

(3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a

"charitable institution" serves any person who needs the particular type of charity being offered.

(4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.

(5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

(6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

Id. at 215.

Applying those factors, this Court held that the petitioner in *Wexford Medical Group* **was** a charitable institution. Among other reasons, this Court emphasized the following:

> Petitioner has a charity care program that offers free and reduced-cost medical care to the indigent with no restrictions. **It operates under an open-access policy under which it accepts any patient who walks through its doors, with preferential treatment given to no one.** Although petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears those losses rather than restricting its treatment of patients who cannot afford to pay.

Id. at 216-17 (emphasis added). Thus, because the petitioner "provided a gift – free or below-cost health care – to an indefinite number of people by relieving them of disease or suffering," the petitioner was entitled to the exemption.

b. *Wexford Medical Group* was correctly decided and should be upheld.

All of the parties agree that *Wexford Medical Group* was correctly decided with respect to the "nondiscrimination" factor. As discussed above, *Wexford Medical Group* was based on a careful, thorough review of nearly a century of case law from this Court, and its six-prong test is firmly rooted in that case law and in the fundamental definition of "charity." Specifically, with regard to its prohibition again discrimination, this Court was correct in holding that "a charitable

institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group." The meaning of that phrase is disputed – as discussed below – but no brief filed in this case has articulated any reason to overturn the standard itself.

Even if this Court believes that *Wexford Medical Group* was wrongly decided, the decision should nonetheless be upheld based on the doctrine of stare decisis. This Court has held that "[u]nder the doctrine of stare decisis, 'principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed.'" *McCormick v Carrier*, 487 Mich 180, 209-210; 795 NW2d 517 (2010), *quoting Brown v Manistee Co Rd Comm'n*, 452 Mich 354, 365; 550 NW2d 215 (1996). Rather, to "'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .'" *McCormick*, 487 Mich at 210, *quoting Petersen v Magna Corp*, 484 Mich 300, 314-15; 773 NW2d 564 (2009). This Court and the Supreme Court of the United States have both recognized that this doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *McCormick*, 487 Mich at 210, *quoting Payne v Tennessee*, 501 US 808, 827 (1991).

Because of the importance of this doctrine, "there is a presumption in favor of upholding precedent[.]" *McCormick*, 487 Mich at 210. This presumption can only be overcome "if there is a special or compelling justification to overturn precedent," which "requires more than a mere belief that a case was wrongly decided." *Id.* at 210. Overturning precedent requires this Court to "review whether the decision at issue defies 'practical workability,' whether reliance interests

would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

Here, the six-prong test of *Wexford Medical Group* was thoughtfully established by this Court and should not be overturned. There is a presumption in favor of upholding precedent, and – given that all of the parties agree that the case was correctly decided – there has been no showing of "special or compelling justification to overturn precedent" to rebut that presumption. *McCormick*, 487 Mich at 210. Nor have there been any "changes in the law or facts" that would call into question the basis of the decision. *Robinson v City of Detroit*, 462 Mich 439.

Moreover, overturning *Wexford Medical Group* would create undue hardship, as it is relied upon by the Michigan Tax Tribunal and the Court of Appeals in evaluating property tax exemption cases. *See, e.g., Telluride Ass'n, Inc v City of Ann Arbor*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2013 (Docket Nos. 304735, 305239)[2] (no exemption for university housing facility that hand-picked scholarship recipients based on merit and interview); *see also Genesee Christian Day Care Services v City of Wyoming*, MTT No 361657 (Dec 22, 2011) (no exemption for day care that only accepted families who could afford to pay). The lower court decisions show that the six-prong test of *Wexford Medical Group* remains viable. In light of this reliance and given the presumption in favor of upholding precedent, the Amicus Parties urge this Court to uphold *Wexford Medical Group*.

III. Appellant is not entitled to a property tax exemption because it offers charitable benefits on a "discriminatory basis" – meaning that it treats potential recipients unequally and does not "serve any person who needs the particular type of charity being offered."

This Court's Order directing oral argument on the Application asks the parties to brief "how 'discriminatory basis' should be given proper meaning." Appellant focuses its discussion

[2] The Amicus Parties are aware of the recent amendments to MCR 7.215 regarding the citation of unpublished opinions, but these opinions are being cited to show that the lower courts have relied on *Wexford Medical Group*.

on whether a taxpayer can be a charitable institution if its benefits are not "completely free" to anyone. Respectfully, Appellant misses the point[3]. The question is not whether benefits must be completely free; the question is what it means – or, in practical terms, what it looks like – for a taxpayer to offer charitable benefits on a "discriminatory basis."

As discussed below, these Amicus Parties submit that **a taxpayer offers benefits on a "discriminatory basis" if, through its policies or practices, it does not "serve[] any person who needs the particular type of charity being offered."** *Wexford Medical Group*, 474 Mich at 215. This includes a scenario like the instant case, where the taxpayer does not offer charity to an indefinite number of people, but only to its existing residents. It also includes cases in which charitable benefits are not offered on equal terms -- either because the taxpayer imposes different requirements on different recipients, or because the taxpayer "hand selects" which recipients are deemed deserving of the charity. In such cases, the taxpayer is not truly bestowing "charity" on those in need, and thus it is not entitled to a property tax exemption.

A. Charitable benefits are offered on a "discriminatory basis" when the taxpayer fails to serve "any person who needs the particular type of charity being offered."

This Court provided guidance as to what "discriminatory basis" means when it articulated the third part of the *Wexford* test:

> A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. **Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.**

Wexford Medical Group, 474 Mich at 215 (emphasis added). The emphasized sentence is consistent with the definition of "charity," which requires a "gift . . . for the benefit of an

[3] Appellant's discussion seems more related to the fifth part of the test, which states that "A 'charitable institution' can charge for its services as long as the charges are not more than what is needed for its successful maintenance." *Wexford Medical Group*, 474 Mich at 215. This Court's Order did not direct briefing on that part of the test.

indefinite number of persons." Thus, a "charitable institution" cannot exclude individuals who are within the group of people who need the charity being offered.

This Court reached a similar conclusion in *Retirement Homes*, 416 Mich at 340. In that case, this Court held that a charitable institution must use its property "in such a way that it 'benefit[s] the general public without restriction.'" *Id.* at 348. The *Retirement Homes* Court denied an exemption for a retiree apartment complex, concluding that there was "no 'gift' for the benefit of an indefinite number of persons or for the benefit of the general public without restriction . . ." *Id.* at 349.

In this case, Appellant offers its purported "charity" – an income-based program at its senior living facility – only to existing residents, and not to applicants or other non-resident seniors. Appellant requires applicants to satisfy certain income requirements before they can become residents. Thus, to be eligible for the income-based program, an individual must first have sufficient income to become a resident, and only then will the "charity" be made available. The Court of Appeals summarized Appellant's policy as follows:

> [P]etitioner's charity care policy is not broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Instead, petitioner's only stated charity care policy is the income based program, itself. **But to be eligible for the program, one must first be a resident. And to be a resident, one must have the ability to pay at the outset.** If not, petitioner will not accept the applicant. This means that in order to be eligible for the income based program, one must have been able to pay, at some point, more than what government assistance would offer. Indeed, petitioner has never admitted any resident who did not in the beginning have the ability to pay more than this. **So while it is true that petitioner does not discriminate among its residents who are eligible for the income based program, entry into this charity is conditioned upon the Stone Crest residency requirements, which in turn, are conditioned on the ability to pay. <u>This type of pay-to-play policy means petitioner does not "serve[] any person who needs the particular type of charity being offered."</u>**

Court of Appeals Opinion, p. 5 (emphasis added).

As the Court of Appeals correctly held, Appellant is not a charitable institution because it does not offer charity to the general public or to an indefinite number of persons. Even within the group that it purports to serve (senior citizens in need of housing), Appellant does not "serve any person who need the particular type of charity being offered." Appellant withholds its charity from senior citizens who need housing and who cannot afford the full market price, and it instead confers that "charity" only on seniors who have already paid to become residents. This is the kind of discrimination that the *Wexford Medical Court* meant to prohibit for charitable institutions. If such discrimination were allowed, then a taxpayer could obtain a property tax exemption even when it provides no benefit to the public, like Appellant in this case.

Because Appellant does not "serve any person who needs the particular type of charity being offered," Appellant is offering its benefits on a "discriminatory basis" under *Wexford Medical Group.* Accordingly, Appellant is not entitled to a property tax exemption, and the Application for Leave to Appeal should be denied.

B. Charitable benefits are offered on a "discriminatory basis" when they are made available on unequal or subjective terms, rather than on a "first-come, first-served" basis.

Looking beyond the facts of this case, "discriminatory basis" also includes other scenarios in which a taxpayer does not even-handedly offer the benefits of its "charity." According to *Wexford Medical Group*, a taxpayer offers charity on a "discriminatory basis" when it subjectively hand-selects which individuals are worthy of receiving the charitable benefits or otherwise extends benefits on unequal terms.

This conclusion is drawn directly from the language of *Wexford Medical Group:*

> A "charitable institution" does not offer its charity on a discriminatory basis **by choosing who, among the group it purports to serve, deserves the services**. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.

Wexford Medical Group, 474 Mich at 215 (emphasis added). As discussed above, this factor is consistent with the well-established[4] definition of "charity":

> [Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

A key component of that definition is the requirement that charity be a gift for "the benefit of an indefinite number of persons" – **meaning that the gift is not limited to certain, preferred individuals.** Indeed, this Court held in *Michigan Baptist Homes* that a charitable institution cannot "hand select" the individuals who receive charitable benefits. *Mich Baptist Homes*, 396 Mich at 668-69. In that case, a nursing home required residents to pay substantial up-front and monthly fees, and it offered free or reduced rates only to residents who were "hand selected by the establishment" after an application process. *Id*. This Court held that the nursing home was not a charitable institution because it did not "serve the elderly generally," but, rather, "provide[d] an attractive retirement environment for those among the elderly who have the health to enjoy it and who can afford to pay for it." *Id.* at 671. Thus, consistent with *Wexford Medical Group* and *Michigan Baptist Homes*, a charitable institution must extend its offer of benefits equally, rather than picking and choosing who is benefitted.

This Court in *Wexford Medical Group* appreciated, of course, that resources are limited and a charity cannot literally serve *everyone.* This Court therefore clarified as follows:

> A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general

[4] This definition of "charity" was first articulated in 1867 and has since been favorably used by courts across the country. *See Jackson v. Phillips, 96 Mass. 539, 556, 14 Allen 539 (1867); see, e.g., Provena Covenant Med Center v Dep't of Revenue*, 236 Ill 2d 368; 925 NE2d 1131 (Ill 2010); *Under the Rainbow Child Care Ctr Inc v City of Goodhue*, 741 NW2d 880 (Minn 2007); *Catholic Health Initiatives Colorado v City of Pueblo*, 207 P3d 812 (Colo 2009).

> sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. **This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group.** The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

Wexford Medical Group, 474 Mich at 213 (emphasis added). This Court then provided a concrete example of this principle in action:

> In accord with its mission, petitioner has a "charity care" policy and an "open-access" policy for Medicare and Medicaid patients. The charity care policy provides free and discounted health care to anyone whose income is up to twice the federal poverty level. **Under its open-access policy, patients are treated on a first-come, first-served basis, and petitioner places no limit on the number of Medicare and Medicaid patients it will treat.** In 2000, two patients took advantage of the charity care program; 11 patients used it in 2001. The total value of care rendered to these 13 patients was $ 2,400. Petitioner also reported that 50 percent of its patients utilized Medicare or Medicaid, which it stated was a significantly higher percentage than was true for other providers in the area.
>
> * * *
>
> **[Petitioner] operates under an open-access policy under which it accepts any patient who walks through its doors, with preferential treatment given to no one.** Although petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears those losses rather than restricting its treatment of patients who cannot afford to pay.

Id. at 216-17 (emphasis added).

From this, the Court can discern what "discriminatory" means. The taxpayer in *Wexford Medical Group* was an exempt "charitable institution" because it did not discriminate against any patient who needed care, regardless of ability to pay. The taxpayer gave "preferential treatment to no one." *Id.* Rather, the taxpayer "accept[ed] any patient who walk[ed] through its doors" and treated those patients on a "first-come, first-served basis," with no limit on the number of total Medicare or Medicaid patients it would treat. *Id.*

Thus, to be a "charitable institution" under *Wexford Medical Group*, the taxpayer must offer its charitable benefits on equal terms – that is, charity should be conferred on an "open access" or "first-come, first-served" basis." If the taxpayer in *Wexford Medical Group* had offered unfettered health care access to patients who could pay, but imposed burdensome requirements on Medicare or Medicaid patients (such as an interview process or additional criteria that did not apply to other patients), then this Court likely would have reached a different conclusion.

This Court made clear in *Wexford Medical Group* that while a charity can serve a particular subset of the population – such as health care patients or senior citizens – the charity cannot espouse preference for or against particular individuals *within that group.* And, importantly, a charity cannot make it *harder* for low-income individuals to receive the benefit of the taxpayer's charitable gifts. Put another way, a charity can serve a defined group that needs the "gift" that it offers, but within that group, the charity cannot pick and choose which individuals are deserving of that gift. *See Mich Baptist Homes*, 396 Mich at 668-69 (charitable institution cannot "hand select" which individuals receive care).

If this requirement were not included, then any non-profit organization could provide "charity" to a select few individuals of its choosing, without offering those benefits to anyone else, and claim a property tax exemption. A sorority could offer free tutoring sessions to sorority members, and then argue that the sorority house should be tax exempt. But while such an entity might classify as a non-profit and even be recognized as such under Section 501(C)(3) of the Internal Revenue Code for income tax purposes, the entity would not be a *charity* under Michigan's property tax laws.

This highlights an important difference between charities and other non-profit organizations: unlike a charity, a non-profit organization can pick and choose who benefits from its goodwill. For example, an educational foundation can subjectively decide which students should receive a college scholarship based on their scholastic, athletic, or other achievements. But while such giving is laudable, it does not make the non-profit organization a ***charity***. *See, e.g., Rampant Lion Foundation v City of Ann Arbor*, MTT No 109231 (May 31, 1989) (educational foundation that awarded scholarship was not entitled to charitable exemption under MCL 211.7o); *see also Ladies Literary Club v City of Grand Rapids*, 409 Mich 748, 753 n 1; 298 NW2d 422 (1980) ("no presumption may be drawn" from an institution's § 501(C)(3) status because Michigan's property tax exemption is narrower than the federal tax exemption). A charity does not hand-select its recipients based on merit or other subject criteria. Rather, a charity opens its doors to those who need it, on a first-come, first-served basis, like the taxpayer in *Wexford Medical Group.*

The property tax exemption at issue in this case must be afforded only to *charities*, which offer benefits even-handedly to anyone in need, and not to other non-profit organizations, who can subjectively choose the individuals who will receive benefits or extend benefits on unequal terms. This interpretation is not novel, nor does it require this Court to grant leave to appeal. Rather, this interpretation is derived from and wholly consistent with *Wexford Medical Group*. Given that this Court has already spoken at length about this exemption and its proper application in *Wexford Medical Group*, the Amicus Parties urge this Court to deny the Application and allow *Wexford Medical Group* to stand undisturbed.

C. Charities must not be allowed to discriminate against the poor.

Contrary to the interpretation discussed above, amicus party CWF advocates a reading of "discrimination" that would allow charities to discriminate against the poor. CWF's position

must be rejected both because it is legally meritless and fundamentally incompatible with the legal and common-sense definitions of "charity."

First, CWF's unconventional position must be placed in context: CWF wants this Court to endorse discrimination against the poor because such a holding would be advantageous in CWF's pending property tax exemption case. *Chelsea Health & Wellness Foundation v City of Dexter et al*, MTT Docket No. 14-001671 **(Exhibit A),** *on appeal*, Court of Appeals Docket No. 332483**.** In that appeal, CWF seeks a property tax exemption as a "charitable institution" for its 46,000 square foot fitness center, which has an indicated true cash value of more than $10 million. (Tribunal Opinion and Judgment, Exhibit A, p. 26.)

CWF charges a market membership rate of $185/month for a family of four. *Id.* at 29. As this hardly can be considered a "gift," CWF also offers a "scholarship" program, which applies to an individual whose income is at or below 200% of poverty guidelines, subject to income verification and a doctor's note stating the health benefit of a membership at the center. *Id.* at 41-42. However, the "scholarship" only allows free access for eight weeks. After that period, the individual must pay 50% of the usual rate, *and* must use the fitness center a minimum of twice a week – a requirement that does not apply to members paying the usual membership rate. *Id.* at 42.

In analyzing the exemption request, the Tribunal framed the third prong of *Wexford Medical Group* as follows: "[T]he issue is whether Petitioner is offering its services on a discriminatory basis *by choosing who, among the group it purports to serve, deserves the services*." *Id.* at 44 (emphasis in original). The Tribunal concluded that CWF failed this prong:

> While Petitioner's CEO appears to the Tribunal to be genuinely interested in providing access to everyone, the evidence shows that **persons with financial difficulties still have extra hoops to jump through to be able to overcome financial barriers to use the facility. The written policy places requirements**

> **upon scholarship members that are not present for those who can pay the fee.** Not only must prospective scholarship applicants verify their financial status, they must use the facility at least twice a week, or be in danger of losing their ability to use the facility.

Id. at 44-45 (emphasis added).

The Tribunal further acknowledged that the reduced monthly charge of $92.50 for a family of four is hardly "charity," and it noted that "a 50% rate would likely continue to limit those among the group Petitioner purports to serve, deserves the services. . . . As [testimony showed], the poor tend to have poorer health." *Id.* at 45.

The problem of allowing charities to discriminate is clearly illustrated by the CWF case. By imposing additional requirements on individuals who cannot afford the $185/month membership fee, and by offering only a 50% discount of this sizable fee, CWF makes it **harder for the poor** to receive the benefits of the fitness center. The Tribunal correctly held that CWF discriminated against low-income persons. Now, as an amicus party in this case, CWF claims that charities should be allowed to discriminate against the poor. *See* CWF Amicus Brief, p. 18 (**"the poor should not be a subclass of those against which a charity may not discriminate under Factor 3"**). While such a startling argument serves CWF's own interest in avoiding property taxes, it is plainly contrary to *Wexford Medical Group* and the heart of the charitable institution exemption. Indeed, the dictionary definition of "charity" places the focus squarely on the poor, who most need help:

> "Charity"
>
> . . .
>
> a: generosity and helpfulness especially toward the needy or suffering; also : aid given to those in need
>
> b : an institution engaged in relief of the poor

c : public provision for the relief of the needy

Merriam-Webster Dictionary, accessed July 18, 2016.[5]

CWF's claim that charities can impose additional requirements on low-income people is incompatible with the definition of charity and discourages the poor from seeking CWF's services. As the Tribunal aptly noted, "[w]hat cannot be proven is how many low income persons never bothered to apply for membership because its costs, and written policy were prohibitive." (Exhibit A, p. 45.) Rather than "accommodate" the poor, as CWF purports to do, CWF creates barriers that prevents low-income individuals from receiving its services.

If taxpayers are permitted to create charity "policies" that impose additional requirements on low-income individuals, then it would become easy for a taxpayer to escape property taxes by creating a policy so onerous that no charity would actually be provided. For example, although it has not done so, CWF could require its low-income members to visit the gym seven days a week (instead of two days a week) to remain eligible for the 50% discount. Such an onerous requirement would almost certainly discourage anyone from participating in the "scholarship" program, and as a result, CWF would like provide no discounted benefits at all. But under CWF's reasoning – that a charitable institution can discriminate against the poor and offer services to them on unequal terms – such a policy would not preclude CWF from receiving a property tax exemption, even if *no one* actually signed up for the program.

The property tax exemption sought by Appellant in this case demonstrates the same problem. As discussed above, Appellant operates assisted living facilities. To become a resident, an individual must demonstrate an ability to pay the $400 monthly fee, which requires more than Medicaid or Medicare benefits. Appellant offers financial assistance (in the form of a reduced monthly fee) only to individuals who are already residents of the facility. Appellant

[5] http://www.merriam-webster.com/dictionary/charity

does *not* offer that financial assistant to applicants who are not yet residents. Consequently, Appellant discriminates against applicants who do not have the ability to pay the $400/month fee, as it will not offer them the same financial assistance that is afforded to residents.

As the Tribunal and Court of Appeals correctly held, Appellant is discriminating within the group of people that it serves (seniors in need of assisted living), and that discrimination shows a preference for individuals who have the ability to pay. **Like CWF, Appellant is discriminating against the poor.** This is precisely the kind of discrimination that this Court has already condemned in *Michigan Baptist Homes* (no exemption for facility that only served "the elderly who have the health to enjoy it and who can afford to pay for it") and *Retirement Homes* (no exemption for facility where residents were "chosen on the basis of their good health, their ability to pay the monthly charge, and, generally, their ability to live independently"). *See Mich Baptist Homes*, 396 Mich at 671; *see also Retirement Homes*, 416 Mich at 349-50. Like those taxpayers, Appellant is not a "charitable institution" and is not entitled to a property tax exemption under either MCL 211.7o or MCL 211.9.

In sum, this Court has already made clear in *Wexford Medical Group, Michigan Baptist Homes*, and *Retirement Homes* that discrimination against the poor will preclude a taxpayer from receiving a "charitable institution" property tax exemption. In light of the guidance found in these prior cases, which were correctly decided and soundly reasoned, this Court should reject CWF's arguments and deny the Application for Leave to Appeal.

D. <u>"Discriminatory basis" must not be limited to discrimination against suspect classes.</u>

After arguing that charities should be allowed to discriminate against the poor, CWF goes on to argue that a "charitable institution" should be allowed to discriminate against *anyone*, as long as it does not discriminate against members of a "suspect class" – that is, based on race, sex,

religion, or other protected statuses. Appellant makes a similar argument. (Appellant's Supplemental Brief, pp. 8-9.) This argument is legally meritless and leads to an unjust result.

First, the argument fails because discrimination against suspect classes is already prohibited under the law. The Elliott-Larsen Civil Rights Act, Act 453 of 1976, MCL 37.2101 *et seq*, begins with a clear declaration that such classes are already protected from discrimination:

> The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

MCL 37.2102. Thus, any business or charity offering housing, public accommodations, public service, or educational facilities is already prohibited from discriminating based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.

Additionally, an entity cannot be a tax-exempt nonprofit organization under Section 501(C)(3) of the Internal Revenue Code if it engages in racial discrimination. *See Bob Jones Univ v United States*, 461 US 574 (1983) (private school not having a racially nondiscriminatory policy as to students was not charitable within the common law concepts reflected in §§ 170 and 501(C)(3) of the Internal Revenue Code). Under *Wexford*, a "charitable institution" must be a "nonprofit organization," which requires recognition under Section 501(C)(3). *See Chelsea Health and Wellness Foundation v City of Dexter et al* (Exhibit A, p. 29). Thus, by virtue of the 501(C)(3) status requirement, a "charitable institution" is already barred from engaging in racial discrimination.

In light of those existing prohibitions, *Wexford Medical Group* cannot be read to limit the phrase "discriminatory basis" to discrimination against suspect classes. If discrimination against protected classes is already prohibited, why would this Court add nondiscrimination as a discrete

factor? Clearly, this Court meant that charitable institutions cannot discriminate between people in the group to be served, regardless of whether that discrimination is based on membership in a "protected class" or based on another attribute or circumstances, such as the individual's ability to pay. The Court's intent is plain from the language of its opinion, where it articulated the third prong of the six-prong test:

> A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.

Wexford Medical Group, 474 Mich at 215.

If this Court meant to define "discriminatory basis" as discrimination only against those in "suspect classes," then this Court could easily have stated as much in its Opinion. This Court did not do so. Rather, this Court's Opinion dictates that a "charitable institution" may not give preference to certain individuals over others within the group that it purports to serve. *Id.*

That conclusion is further evidenced by this Court's favorable citation to the *Wexford Medical Group* petitioner's "open-access" policies, under which the petitioner provided care "with preferential treatment given to no one." This Court made no mention of race, color, or creed when discussing the petitioner's policies because the critical fact was that there was no discrimination of *any* kind; the petitioner provided equal access to *anyone* who needed care, **regardless of their ability to pay.**

Appellant's and CWF's argument that charities can discriminate against anyone, except those of "suspect classes," fails under any reasonable construction of *Wexford Medical Group* and the case law on which it relied. Accordingly, this argument must be rejected.

E. The current interpretation of *Wexford Medical Group* will not put charities "out of business."

CWF's last argument presents a "Doomsday" view of the issue. CWF contends that if *Wexford Medical Group* is not re-interpreted by this Court, then every charity will be "require[d] . . . to spend itself out of existence" because charities will not have "the ability to impose some limit on the services it offers to the indigent to enable it to remain solvent." (CWF Brief, p. 15.)

This "sky is falling" perspective has not been borne out by reality. Charities have continued to survive and thrive in the ten years since *Wexford Medical Group.* More importantly, this Court has already recognized that charities are not required to "spend [themselves] out of existence":

> A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. **This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought.** Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

Wexford Medical Group, 474 Mich at 213 (emphasis added).

In articulating the very standard that is at issue in this Application, this Court acknowledged that a charity need not "serve every single person." But in limiting who receives service, the charity cannot discriminate. It cannot hand-pick the individuals who are deemed worthy of receiving services. Rather, a charity should offer its benefits through an "open access" policy on a "first-come, first-served basis," giving "preference to no one," like the petitioner in *Wexford Medical Group.* That is the standard that this Court has already established, and it is a standard that has proved workable and fair in practice over the last ten years. Appellant has

shown no reason for revisiting the sound conclusion of *Wexford Medical Group.* Therefore, the Amicus Parties request that this Court deny the Application.

CONCLUSION

This Court correctly held in *Wexford Medical Group* that charitable institutions must offer charitable benefits on equal terms, without discriminating against individuals who need the benefits that the charity provides. If this Court grants leave to appeal and adopts Appellant's or CWF's narrow interpretations of "discrimination," then any non-profit organization will be able to charge market rates and call itself a "charity," thereby avoiding its property tax burden at the expense of the local taxing unit and other taxpayers in the community.

Equally concerning is Appellant's and CWF's assertion that charities should be allowed to discriminate based on an individual's ability to pay. Under their reasoning, a "charity" can create obstacles that make it difficult or impossible for low income persons to benefit from the charity's services. If this interpretation were adopted, it would turn nearly a century of case law on its head, undermine the foundational definition of "charity," and result in a profoundly unjust rule of law: *that charities can discriminate against the poor.*

Such an unreasonable result must be avoided. Rather, this Court should stand by its prior decision: that a charitable institution must serve any person who needs the particular type of charity being offered, without discrimination. Instead of entertaining Appellant's and CWF's dangerous interpretation, the Amicus Parties respectfully request that this Court allow *Wexford Medical Group* to stand, and deny the Application for Leave to Appeal.

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Dated: July 26, 2016

By: */s/ Laura J. Genovich*

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EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Chelsea Health and Wellness Foundation,
Petitioner,

v

MTT Docket No. 14-001671

Scio Township,
Respondent,

Tribunal Judge Presiding
David B. Marmon

and

City of Dexter,
Dexter Downtown Development Authority,
and Michigan Department of Treasury,
Intervening Respondents.

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Chelsea Health & Wellness Foundation ("CWF") appeals the March 2014 Board of Review's denial of a requested charitable exemption from property taxation under MCL 211.7o of parcel number HD 08-06-455-001.

After various preliminary motions, including cross motions for Summary Disposition, a hearing on this matter was held on January 4, 5, 6, 7, 8, 11, 12 and 13, 2016. Petitioner was represented by Joanne B. Faycurry, Marcy L. Rosen, and Matthew Kennison of Schiff Hardin, PLC. Respondent Township of Scio ("Scio") was represented by John L. Etter of Reading, Etter & Lillich, Intervening Respondents City of Dexter and Dexter Downtown Development Authority ("Dexter") were represented by Scott E. Munzel of Scott E. Munzel PC, and Intervening Respondent Michigan Department of Treasury, ("Treasury") was represented by Adam P. Sadowski, Assistant Attorney General. Petitioner called 16 witnesses, marked 368 exhibits, and caused 115 of those exhibits to be admitted into evidence, as well as 1 exhibit marked by Treasury. Respondents cumulatively called 5 witnesses, and had 29 exhibits admitted into evidence. Scio neither marked, nor offered exhibits; Dexter marked 39 Exhibits, introduced 17, all of which were admitted, and caused 12 of Petitioner's marked exhibits to be admitted as well. Treasury listed 22 exhibits, but did not introduce any, although one of its exhibits was introduced into evidence by Petitioner. Post-hearing briefs were ordered and received from all

parties. Based on the evidence, testimony, briefs of each party ordered at the close of hearing and filed on March 17, 2016, as well as Petitioner's Reply Brief filed on March 31, 2016, along with the case the file, the Tribunal finds:

The subject properties shall be granted an exemption, under MCL 211.7o for the 2014 and 2015 tax years in the amount of 0%.

The subject property's true cash values ("TCV"), state equalized values ("SEV") and taxable values ("TV") for the tax years at issue shall be as follows:

Parcel Number: HD 08-06-455-001

Year	TCV	SEV	TV
2014	$10,344,200	$5,172,100	$5,172,100
2015	$10,648,400	$5,324,200	$5,254,853

PETITIONER'S ADMITTED EXHIBITS

The following were admitted as Petitioner's exhibits:

P-4 Brochures describing various programs[1]

P-6 Community Programs Flyer Fall 2014[2]

P-7 Community Programs Flyer Winter 2014[3]

P-8 Community Programs Flyer Spring/Summer 2014[4]

P-9 Community Programs Flyer Spring/Summer 2015[5]

P-10 Community Programs Flyer Winter/Spring 2015[6]

P-26 Membership Card for Dexter Wellness Center[7]

P-27 Management Agreement dated 9/5/13 between CWP and Power Wellness Management LLC, ("PWM")[8]

P-28 Management Agreement dated 12/10/14 between CWP and PWM[9]

P-38 MFA certification criteria and other information[10]

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[1] January 6, 2016 transcript, ("T.3") p. 122
[2] January 11, 2016 transcript, ("T.6") p. 58
[3] T.6 p. 58
[4] T.6 p. 58
[5] T.6 p. 58
[6] T.6 p. 58
[7] January 5, 2016 transcript, ("T.2") p. 131
[8] T.2 p. 93
[9] T.2 p. 93
[10] T.3 p. 79

P-41 CWF Scholarships Memo[11]

P-55 Financial Report 2013-2014[12]

P-72 Village of Dexter Master Plan excerpt[13]

P-78 Dexter Village Update, Fall 2014[14]

P-79 Emails between Chris Garfield and Etter's office re: United Methodist Retirement Communities[15]

P-80 Brochure for The Cedars [16]

P-81 Tribunal stipulation for *United Methodist Retirement Communities v Webster Twp*., MTT Docket No. 417146 entered July 10, 2013[17]

P-82 Webster Twp. BSA page for United Methodist Retirement Communities[18]

P-83 Shawn Keough report to council dated March 24, 2013[19]

P-84 DDA Meeting document, dated 10/08/2013[20]

P-85 Letter dated 10/31/13 co-signed by Shawn Keough to Steve Brouwer re: future tax revenue to the DDA[21]

P-86 Email from Shawn Keough re: closed session meeting dated 10/29/13[22]

P-87 Emails from Shawn Keough to Donna Dettling re: closed session dated 10/29/13[23]

P-88 Email from Keough to Steve Brouwer dated January 8, 2014[24]

P-89 Letter from Keough to Michale Finney of MEDC dated 10/23/13[25]

P-90 email from Dettling to Keough with financial consequences to Dexter, and the DDA[26]

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[11] T.2 p. 41
[12] T.6 p. 182
[13] January 12, 2016 transcript ("T.7") p. 109
[14] T.7 p. 71
[15] T.7 p. 71
[16] T.7 p. 71
[17] T.7 p. 71
[18] T.7 p. 71
[19] T.7 p. 71
[20] T.7 p. 71
[21] T.7 p. 71
[22] T.7 p. 71
[23] T.7 p. 71
[24] T.7 p. 71
[25] T.7 p. 71
[26] T.7 p. 71

P-91 BSA tax sheets for Scio Twp. for 3045 Broad St. from 2000 to 2015[27]

P-92 Notice of Continuation and Subpoena Duces Tecum for Shawn Keough[28]

P-93 Dexter's goals and objectives for FY 2014-2015

P-94 DWC sign in sheets for meeting held 10/14/14 and 6/9/15[29]

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[34] T.7 p. 71
[35] T.3 p. 131
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[43] T.6 p. 48
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[46] T.8 p. 65
[47] T.6 p. 222
[48] T.3 p. 147
[49] T.7 p. 159
[50] T.2 p. 127
[51] January 4, 2016 transcript ("T.1") p. 62
[52] T.1 p. 65
[53] T.1 p. 72
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[64] T.7 p. 77
[65] T.2 p. 14
[66] T.2 p. 24
[67] T.1 p. 102
[68] T.3 p. 148
[69] T.1 p. 58
[70] T.1 p. 73
[71] T.6 p. 189
[72] T.6 p. 73
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[91] T.1 p. 182
[92] T.2 p. 78
[93] T.3 p. 121
[94] T.1 p. 201

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[111] T.5 p. 65
[112] T.6 p. 24
[113] T.2 p. 50

PETITIONER'S CONTENTIONS

Petitioner contends that it meets the requirements under MCL 211.7o, as well as under case law for the subject property, with a small exception for a leased area, to be exempt from property taxation. Petitioner did not contest the subject's True Cash Value, and other than the exemption issue, did not contest the subject's state equalized value or taxable value. Petitioner's contentions as to the resulting state equalized value and taxable value are as follows:

Parcel Number: HD-08-06-455-001

Petitioner's contentions		
Year	SEV	TV
2014	$233,700	$233,700
2015	$233,700	$233,700

PETITIONER'S WITNESSES

Amy Heydlauff

Petitioner's first witness was Amy Heydlauff, who testified for two and one half days. She clarified that Petitioner changed its name in 2015 to The 5 Healthy Towns Foundation.[114] She has a Master's Degree in Health Services Administration from the University of Michigan, and is a Registered Nurse.[115] She discussed her CV, background, experiences and career in healthcare and healthcare administration prior to working with Petitioner.[116] For the years at issue, and currently, she is the Chief Operating Officer of Petitioner, and is a voting member of its Board of Directors.[117] She testified that she is also on the Board of Directors of Silver Maples of Chelsea, a non-profit retirement community, of which Petitioner is a 50% owner.[118]

Among the highlights of her testimony, she gave an overview as Petitioner's CEO of the many activities that further CWF's stated vision and mission, including the four elements of "eat better, move more, avoid unhealthy substances, and connect with others in healthy ways."[119]She testified as to comprehensive wellness plans CWF put forth as part of its 5 Healthy Towns initiatives.[120] She discussed how Petitioner funds numerous programs, which are termed

[114] T.1 p. 35
[115] T.1 p. 36-40
[116] T.1 p. 35-57
[117] T.1 p. 53-54
[118] T.1 p. 56
[119] T.1 p. 104
[120] T.1 p. 127-184

"interventions" which support its vision. For example, CWF funded Safe Routes To School,[121] a Bike Lending Program, installation of bike racks and various exercise programs throughout Chelsea, Dexter, Manchester, Grass Lake and Stockbridge to encourage area citizenry to move more. For the same towns, CWF funded various programs to improve nutrition such as Healthy Cooking classes,[122] Farm to School Gardens program,[123] Michigan Farm to School programs and Farmer's markets. In support of its vision of helping the 5 towns avoid unhealthy substances, Petitioner funded the SRSLY program aimed at preventing and reducing youth substance abuse,[124] along with the Big Red Barrel Program, allowing for the safe disposal of unused medication.[125] As for its fourth element of having people connect with others in a healthy way, Petitioner sponsored various classes and physical activities.

On cross, Heydlauff responded as follows to a question regarding the difference between a wellness center and a recreation facility:

> Q: So – okay. Well, let's say, just for a couple of instances, let's say the track. Is there something different about the track in the Dexter Wellness Center, because it's in a medically-integrated facility versus a track in another indoor facility?
>
> A: I would say the difference is not in the building or the – the assets of the building, the equipment of the building, the difference is in the way that we use the building and those assets. That's the difference between some other kind of facility and a medically-integrated facility.[126]

She also testified as follows concerning guest passes to the subject:

> Q: Okay. Well, what is the intent of a guest pass then?
> A: For people to become aware of the facility, learn what's available, learn what kinds of programming is available, and learn what quality of staffing is available. They may be a visitor and so they're coming with a friend or a relative who they're staying with or visiting with and we want to be able to accommodate our -- our members in our community in that way, but it is not intended for long-term use.
>
> Q: Okay. Is it fair to say it's a marketing item?
> A: No, I don't think that's fair.
>
> Q: Why not?
> A: Because -- because our goal is for people to have awareness of the facility so that we can increase membership, so that we can have more people in our

[121] T.1 p. 125
[122] T.1 p. 240
[123] T.2 p. 203
[124] T.1 p. 184
[125] T.1 p. 208
[126] T.3 p. 21

> community taking advantage of the opportunities that are afforded in our Wellness Centers. That's our goal. It helps us meet our mission.· All of our efforts are focused at having as many people in our community exposed to as many opportunities for health and wellness as possible. Those guest passes allow us to do that with people who may not be members of the facility.[127]

Regarding occupancy, Heydlauff testified that she has her own mailbox at the facility, as well as keys to the facility and unrestricted access.[128] Moreover, all of the furniture and equipment present at the facility is owned by Petitioner.[129] Regarding the profitability of CWF and its centers, Heydlauff testified that neither the Stockbridge, nor Manchester center were ever likely to break even.[130] Regarding fees at the subject, Heydlauff testified that previously, CWF has charged an enrollment fee and a reactivation fee equal to $200-400,[131] but eliminated that fee to "eliminate barriers."[132] She also testified that people who have lower incomes, and lower education levels, have a tendency to have poorer health, so those are exactly the kind of people that are the most difficult to reach.[133]

Cindy Cope

Ms. Cope testified that she is a senior director, employed by Power Wellness Management to oversee the Chelsea Center, as well as Manchester and Stockbridge centers, and to offer operational support to subject Dexter Center.[134] She testified regarding her educational and training background in fitness and exercise at Central Michigan University and Chelsea Community Hospital.[135]She previously worked at Chelsea Center when it was part of Chelsea Community Hospital.[136] She testified that PWM also managed Washtenaw Community College Wellness Center.[137] Regarding occupancy, she testified that she is frequently at Dexter Center, and has observed Petitioner's employees Amy Heydlauff and Matt Pegouskie at the Dexter center, and has observed their offices.[138]

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[127] T.3 p. 93-94
[128] T.2 p. 85
[129] T.3 p. 96-97, Heydlauff's response to question from bench.
[130] T.2 p. 204
[131] P-173, p. 001613 Cindy Cope deposition; Rate card, Exhibit P-112 (Cope dep. Exhibit 13).
[132] T.2 p. 97
[133] T.2 p. 40
[134] T.3 p. 98-99
[135] T.3 p. 99
[136] T.3 p. 102
[137] T.3 p. 103
[138] T.3 p. 105-106

As to various programs, Cope testified regarding health fitness assessments performed at all of the wellness centers, including Dexter.[139] She also testified regarding the Next Steps program, and described the various types of activities designed for various medical conditions.[140] As to the subject's certification, she testified regarding the requirements to receive Medical Fitness Association Certification[141]

Regarding Petitioner's scholarship program, Cope testified regarding the evolution of the scholarships program, and had the following exchange on direct examination:

> Q: . . . In 2014, if an applicant for scholarship applied, got the scholarship, wanted to continue for additional months on scholarship, and couldn't afford to pay, would that person be turned away necessarily?
> A: No. The scholarship guidelines was a work in progress. It changed regularly for about a six-,eight-month period. Every time we would just -- we'd have discussions and then it would change, but the documents didn't necessarily reflect all of the changes. So, it even -- it even changed from this version.· It became -- and I don't even know what the date was, but within that time frame it included half off your dues on a regular -- on an ongoing basis. So depends on what time of the year in 2014. I don't know how to answer that question.
>
> Q: Well, are you aware of anybody who had applied for a scholarship, got [the] scholarship and then asked to continue the scholarship and was -- and was refused?
> A: No, I'm not aware of that.[142]

As to the subject of health care assessments performed by Petitioner, Cope testified that roughly half of new members complete a health assessment.[143]

Scott Broshar

Mr. Broshar was Petitioner's third witness. As to his background, he is the owner of Absolute Title Co., and serves on the Board of Directors of Petitioner.[144] Broshar testified regarding Petitioner's mission to create long term cultural shift regarding wellness.[145]

Mr. Broshar testified as follows regarding Petitioner's priorities:

> We have to determine each year how much money we spend of our $25 million initial funding. We spend it based on the investment -- investment returns that we have. There are a lot of different options on -- we could spend -- if we felt that

[139] T.3 p. 108-112
[140] T.3 p. 118-131
[141] T.3 p. 131-134
[142] T.3 p. 139-140
[143] T.3 p. 187-188
[144] T.4 p. 8
[145] T.4 p. 10-11

> there was strategy that would permanently fix health and wellness in our five communities, we could spend the $25 million now, have it be done. And if that was going to permanently fix health and wellness in the communities, I think the Board would do it. I don't think we've ever came up with a way that we would permanently fix health and wellness in our communities. So we have to look each year at how much we're going to spend and we've got some mandatory IRS guidelines that we need to be spending five percent. So our five percent minimum shows that if we spend this amount of money, we will spend, for instance, on the -- on the first chart, approximately $24 million, $25 million over 20 years. Over 40 years we'd spend $50 million. At the end of 50 years, we'd still have essentially our initial investment available to continue spending in perpetuity. If we were to spend more than the five percent, go up to 8 percent, we would have spent about $31 million in the first 20 years and $46 million over 40 years, and at the end of that 40-year period, we'd only have $6 million available to continue to try to improve. The final [chart] is we spend everything in ten years, we would end up spending $32 million total on community health, and we'd have nothing left to sustain the Foundation, which would be great if we thought that community health would be perfect in ten years, but I don't believe that's the case.[146]

Broshar went on to testify regarding the wellness centers having the biggest impact of all of Petitioner's activities on health in the community:

> We have -- we have about -- somewhere in the neighborhood of 400,000 visits per year to the Wellness -- to each of the Wellness Centers that -- the larger two. And we have lots of other – with the coalitions, they have lots of other activities that they propose and they conduct. None of them reaches that number of people, so it's the single biggest impact on the community. It doesn't negate the impact that the other interventions have, but it's the single biggest that we have.[147]

Anne Kittendorf, M.D.

Dr. Kittendorf was Petitioner's fourth witness. She is a practicing family physician, and a faculty member of the University of Michigan medical school.[148] She is also on Petitioner's Board.

Dr. Kittendorf testified regarding the comparative impact of prescribing exercise versus a statin:

> So let's say over -- over two years I -- I advise 100 people to go to the Wellness Center, 50 take me up on it, and 25 end up having sustained lifestyle benefit from that. Okay? So 25 out of 100 is a fourth, so that means I've had to counsel 100 people to positively impact 25 people, which means my number needed to treat is four. And we know by evidence that exercise, when we're thinking about things

[146] T.4 p. 11-12
[147] T.4 p. 16
[148] Curriculum Vitae, Exhibit P-364.

> like preventing heart disease or heart attack, exercise is as effective as putting people on a statin medication. So I'm able to influence more people's health through exercise.[149]

As to referring patients to the subject, Dr. Kittendorf also agreed that it is important to refer her patients to a medically integrated facility because "it provides a different layer of oversight and protections for our participants as well as helping the community at-large."[150]

Dr. Kittendorf testified as to the benefits of the Next Steps program. In illustrating the program's benefits, she gave an example of an elderly patient becoming stronger through "pre-hab" and was able to get home within a week of surgery, saving health care dollars. She further testified:

> And I am firmly convinced it's because he went into surgery with a much better health profile due to his muscle strengthening and balance strengthening that he had. So in and of itself, I know that that saved the system thousands and thousands of dollars. But if we're talking about an elderly person with a hip fracture, not only is there a 50 percent mortality rate for patients who fall and have a fracture within six months, but on top of that the healthcare costs are astronomical, I would guesstimate $100,000 for an elderly person who falls and breaks a hip, and then often long-term costs because they often end up in long-term care facilities.[151]

Counsel had the following exchange on Direct Examination with Dr. Kittendorf regarding the Governor's Four-by-Four Plan:

> Q: . . . "The consequences of obesity are Type 2 diabetes, heart disease, arthritis, stroke and dementia. Currently in Michigan 2.5 million adults and 400,000 children are obese, many of whom already show signs of chronic illnesses. Unnecessary suffering is being caused by obesity, which is mainly driven by sedentary lifestyles and unhealthy eating habits." Do you agree with that?
> A: One hundred percent, yes.
>
> Q: And then the paragraph just below that, next to the chart says, "According to the CDC, 75 percent of total healthcare expenditures are associated with treating chronic diseases.· If Michiganders reduced their BMI rates to lower levels and achieved an improved status of health, the State could save over $13 billion annually in unnecessary healthcare costs." Do you agree with that?
> A: Yes. Critical information . . . . I'll just mention we have a looming crisis with our baby boomers aging, and making sure it's critically important for us to engage in wellness and infrastructure and community health and wellness and opportunities such as what our Foundation is doing. As we have this massive influx, age brings

[149] T.4 p. 51-52
[150] T.4 p. 69
[151] T.4 p. 76-77

> illness in and of itself. So these numbers are very scary and they're bound to get scarier without intervention, so . . . .[152]

Dr. Kittendorf summed up her direct testimony with a narrative that captured how, in her mind, the Wellness Center is integrated into the community to accomplish its mission, weaving in its programs to meet the four elements of its mission.[153]

Hon. Patrick J. Conlin

The Hon. Patrick J. Conlin of the Washtenaw Circuit Court gave testimony as Petitioner's fifth witness. Judge Conlin testified that he was on the Board of Trustees of Chelsea Community Hospital for 10 years, and was Chairman of the Board at the time that Chelsea merged with St. Joseph Mercy Health System.[154]

Judge Conlin testified that there was resistance to having St. Joseph Mercy Health System, a Catholic institution taking over Silver Maples, which was 50% owned by the United Methodist Retirement Community, and 50% by Chelsea Community Hospital. Assigning Chelsea's interest to Petitioner as part of the merger provided a work around. Further, Judge Conlin testified that Petitioner does not benefit from any cash surplus earned by Silver Maples, nor does it remain a guarantor on Silver Maples' debt.[155]

Judge Conlin testified that there were similar concerns by the U of M Family Practice that ownership by a Catholic hospital might limit its practice in the areas of women's health and family practice. Consequently, Petitioner wound up with a ground lease where the U of M Family Practice medical office building sits on the former Chelsea Hospital grounds.[156]

Andrew Eisenberg, M.D.

Petitioner's sixth witness was Andrew Eisenberg, M.D., an Oncologist with 37 years of experience, educated at the University of Michigan.[157] Dr. Eisenberg also testified that exercise in a supervised and community setting has proven more effective in terms of patient compliance in the prevention and treatment of cancer.[158] Dr. Eisenberg stated:

> There are studies that have shown that a supervised exercise program is more effective than just telling somebody, "Go out and exercise." You know, the problem

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[152] T.4 p. 102-104
[153] T.4 p. 117-121
[154] T.4 p. 140-141
[155] T.4 p. 141-144
[156] T.4 p.144-148
[157] T.4 p. 153
[158] T.4 p. 167

> with people with -- that are sick or have an illness, they don't always comply with what the recommendations are. You know, if I prescribe a pill, and the patient doesn't take it, it doesn't do them any good. If I just tell somebody "Go out and exercise", and they don't do it, then it's not going to do them any good. So compliance is an issue, and if there is a supervised program, there's evidence to suggest that compliance is better, and the person is more likely to benefit.[159]

In support, of his testimony, Dr. Eisenberg cited several articles from medical journals.[160]

Peggy Cole

For its seventh witness, Petitioner called Peggy Cole. Ms. Cole is the Development Director with St. Louis Center, which is a Residential community in Chelsea for developmentally disabled children and adults.[161] Ms. Cole testified regarding the receipt of funding from Petitioner for the St. Louis Center for wellness activities and its residents have been able to use the Chelsea Center.[162]

Paul Hillegonds

As its eighth witness, Petitioner called Paul Hillegonds, a long-time member of the state House, and former Speaker of the House. Currently, Mr. Hillegonds is the President of the Michigan Health Endowment Fund.[163] Mr. Hillegonds testified regarding the creation of the Michigan Health Endowment Fund, P.A. 4 of 2013.[164] He described what he believed PA 4 of 2013 to mean:

> Q: Mr. Hillegonds, would you tell me what you believe that to mean?
> A: Well, it does, with the references to how we would benefit health and wellness, really gives, I think, the Board members broad latitude on how we will focus and where we will focus our efforts to benefit health and wellness in children and seniors. And in fact, we're going through strategic planning presently. I have talked with legislators who enacted the law. I wasn't around when the law was enacted. But I think those who were involved hope that we will be a partner of the State in its public health priorities, not an arm of the State. We are not there to replace budget cuts, for example, but we are to work with the State on mutual priorities we have. And I would say the focus in my work so far has been more of a preventative nature to -- one of the -- one of the mandates of the law is that we reduce healthcare costs, and -- and focus on the health of Michigan citizens. And our sense is that a good way to reduce healthcare costs is to do preventative work such as health and

[159] T.4 p. 157-158
[160] T.4 p. 160-161
[161] T.4 p. 164
[162] T.4 p. 165-168
[163] T.4 p. 171
[164] T.4 p. 172-173

> wellness, fitness programs, access to healthy food so that we prevent things that happen later like diabetes.
>
> Q: Would obesity also be a chronic condition that you would include along with diabetes?
> A: Very definitely. Obesity is identified as one of our more unfavorable comparisons with other states. It is a priority of the Department of Health and Human Services. And in the listening tour that our Board did around the State, is a priority of communities, a concern, especially childhood obesity.[165]

Finally, Mr. Hillegonds testified that the Michigan Constitution[166] sets forth the state's role in public health and general welfare.[167]

Jo Mayer

As its ninth witness, Petitioner called Jo Mayer, who is a member of the Stockbridge Area Wellness Coalition.[168] Ms. Mayer testified that the Stockbridge Coalition was offered $200,000 by Petitioner and decided to use all of it to fund a wellness center. She pointed out that Stockbridge has a high incidence of obesity, and the resulting heart disease and diabetes. She testified that 80% of Stockbridge was overweight or had high blood pressure, and the community had a very large unmet need for such a facility.

Wayne Beyea

For its tenth witness, Petitioner called Wayne Beyea. Mr. Beyea teaches planning law at MSU School of Planning, Design and Construction and testified regarding his involvement with the Safe Routes to School program, and its benefits to safety and fitness. He gave the following summary of the program:

> The Safe Routes to School program, in a nutshell, is to try to promote kids to safely walk, bike, and -- as they term it -- "roll" to school safely. It's a -- it's a home-to-school type of a program. It involves assisting communities develop action plans. It involves extensive amounts of outreach, which includes survey of parents and students doing walking audits in the communities; community engagement for input and data analysis; and putting together an action plan that addresses both what they call infrastructure and noninfrastructure type of recommendations. The infrastructure recommendations are to help develop sidewalks and bike paths and other physical amenities in the community. The noninfrastructure is to develop programs that will help educate and encourage kids, and with parents, to walk safely

[165] T.4 p. 175-176
[166] Const 1963 Art IV Section 51
[167] T.4 p. 183-184
[168] T.5 p. 8

> to school. One of the several outcomes of the Safe Routes to School program is also for health and fitness as well, so that kids are prepared in the classroom after walking to school.[169]

Beyea testified that Petitioner had been instrumental in facilitating contact and discussion between communities and his organization in implementing this program. He testified that Petitioner provided over $1 million in funding.[170]

> He also testified concerning the Sustainable Built Environment Initiative:
>
> One of the aspects of a -- of a Sustainable Built Environment is to be able to provide access for individuals of all abilities to be able to walk and bike and access public facilities, parks, et cetera. So the accessibility aspect that we look at, particularly in the Stockbridge plan, was the connections with the schools, the parks, municipal facilities -- such as libraries -- and how we could make the experience walkable and accessible with – with paths and sidewalks that met federal and state requirements.[171]

Beyea praised Petitioner for its assistance and effectiveness in helping to get this initiative enacted and funded in various communities.

Brett Pedersen

Mr. Pederson was called by Petitioner as its eleventh witness. Mr. Pedersen is an assistant principal at Mill Creek Middle School in Dexter, and a group fitness instructor at the subject.[172] He testified regarding Petitioner's Yoga in the Park program.[173]

Matthew Pegouskie

As its twelfth witness, Petitioner called Matthew Pegouskie. Mr. Pegouskie has worked for Petitioner for a number of years, described his past duties, and is currently its Community Investment Manager.[174] He described Petitioner's involvement with various community programs, including Safe Routes to School, and its adoption in some of the communities covered in "5 Healthy Towns." Pegouskie presented a power-point slide show illustrating the Safe Routes to School program. He also testified regarding many other community programs in which

[169] T.5 p. 16
[170] T.5 p. 22
[171] T.5 p. 24
[172] T.5 p. 31
[173] T.6 p. 33-38
[174] T.5 p. 40-50

Petitioner was involved with throughout the five towns. Importantly, he testified that he has an office at the subject property, at which he spends on average, 8 hours per week.[175]

Jeffrey Wallace

The thirteenth witness called by Petitioner was Jeffrey Wallace, the village manager of Manchester. Manchester is one of the "5 healthy towns" serviced by Petitioner.[176] Wallace testified that he is on the Board of CWF, and described various programs and activities sponsored by Petitioner. Some of the programs involving Manchester were detailed by Wallace as follows:

> They do a lot of different programs. They have for the last four years. They help the four issues that we deal with, which is the Eat Better, Move More, Connect with Others, and to make healthy lifestyle choices. And so within that, almost all the programs we have fit into one of those four. We have gazebo concerts. We try to bring people together. That's under the Connect with Other People. Under the Eat Better, we have the Farmer's Market, which they've supported and work with. We also have the Healthy Chef's program, and that's through our Manchester High School, where kids that are not involved in other programs learn to eat healthy, cook healthy, and also learn to use that, and it's been integrated a little bit into the school with lunches and the little events they do. SRSLY is for the kids to make better choices. It used to be called "Manchester Voices," and now it's part of SRSLY. Also, a lot of different things have come out of that. The Red Barrel program came out of that also. That is at our Village Hall where the sheriff's department is. We had a great solution to a problem we had in our community where people didn't know where to go with unused drugs when they had them. Just recently, three months' worth, we had 30 pounds of narcotics that were turned in. It was amazing.[177]

Angela Sargent

Angela Sargent, of PWM and director of the subject property was Petitioner's fourteenth witness. Ms. Sargent testified regarding the qualifications, certificates and degrees of PWM's staff at the subject property.[178] Sargent testified that Ms. Heydlauff maintains an office at the facility and has regularly observed Ms. Heydlauff's presence throughout the facility.[179] She also testified that Petitioner's healthcare advisory committee regularly meets at the subject, and that

[175] T.5 p. 140
[176] T.5 p. 156
[177] T.5 p. 157-158
[178] T.6 p. 10-24; 39-44
[179] T.6 p. 25-27

Board members have been at the Dexter Wellness Center 633 times on Board business since it opened. [180]

Sargent testified as to her understanding of the scholarship policy:

So there are two pathways in which they can receive a scholarship; one is through our Next Steps Program, which is an eight-week program. If they complete that, then they would qualify for one additional month and then 50 percent off dues after that, or they can also just join through general membership, they would receive two months and then 30 percent dues thereafter.

Q: And, "For thereafter," is there a point at which that terminates?
A: As long as they meet the usage requirements, there would be -- no –

Q: Okay. What are the usage requirements?
A: They have to meet minimally two times a week.

Q: Why do you impose that -- why does the Foundation impose that requirement; if you know?
A: Well, there's studies that show that regular exercise and attendance is helpful for their health; and then there's also, you know, if they're not using it, we would want someone else to take advantage of it.

Q: Now, if somebody missed a day or even two days for various reasons, you know, in an accident, lost their job, whatever the reason may be, if that person missed one day or two days of the required sessions that they have to attend, would they be kicked out of the program?
A: No.

Q: Do you know of anybody who has been kicked out of the program for that reason?
A: No.

Q: By the "Program," I mean the scholarship program?
A: Correct.

Q: Now, if somebody were to come into the Dexter Wellness Center after the two months of free membership under the general membership, and said, "I can't afford the 50 percent. I just don't have the money"; is it your understanding that that person would not be permitted to participate in the scholarship program?
A: No, we would work with them.

Q: Do you know whether the scholarship program has a provision for extenuating circumstances?
A: No.

Q: You don't know whether they have that?[181]

[180] T.6 p. 28
[181] Testimony of Amy Sargent, T.6, p. 29-30

A: Oh, I -- yes, there are -- yes, if –

Q: So if I were to use, as an example, somebody came in and said, "I just can't afford to pay the 50 percent. I got this situation where I lost my job, I got medical bills, I can't afford it."· In your mind, would that be an extenuating circumstance?
A: We would work with them, yes.[182]

Sargent also testified regarding the Medical Fitness Association certification and its requirements for the facility and its staff.[183] The bulk of Ms. Sargent's testimony concerned the various programs and classes which were offered at the subject property.

Brian Hummert, CPA

For its fifteenth witness, Petitioner called Brian Hummert. Mr. Hummert testified to his educational and occupational background, and his current title as CEO of Power Wellness Management.[184] He testified about the design of the subject property, which he was familiar with, having worked with the architect, as well as special features that may differentiate it from a commercial facility. Some of those differences are more handicapped spaces closer to the Center, and a porte-cochere allowing for drop off of deconditioned persons; double-entry doors, space for wheel chairs, wider hallways, ADA compliant lockers, towel service, ADA compliant showers. Two or three pools set to different temperatures for aquatic exercise, and assisted changing rooms are another difference. The walk/jog track was designed so that users can walk in pairs, and can use walkers. The track is longer, so it has less turns per mile and is cushioned. Other differences concern types of equipment, cleanliness standards and staff training.[185]

As to training, Hummert testified that a certified medically integrated wellness center is different from a traditional gym or fitness facility. In order to be certified by the MFA, a wellness center must have, among other things, at least three clinical fitness programs for people with chronic medical conditions such as heart disease, pulmonary disease, cancer, chronic pain, orthopedic and/or neurological problems, cerebrovascular disease "stroke", sports injury prevention and rehabilitation neutral counseling, among others. It must offer preventative programs to members, as well as the community at large, especially the disabled population.[186] It

[182] T.6 p. 30-33
[183] T.6 p. 36-39
[184] T.6 p. 137
[185] T.6 p. 140-149
[186] T.6 p. 160; 162-163; P-361 at 7

must also offer certain types of programming for people with chronic illnesses and other health conditions.[187]

Hummert also testified regarding the Next Steps program. Regarding the program's price versus cost, he testified that it costs the facility $220 per participant, even though participants are only charged $99.[188] Hummert was also examined regarding whether the Dexter facility loses money, to which he answered in the affirmative.[189] He testified that the subject suffered a loss of $916,000 for the fiscal year ending March 31, 2014,[190] and $758,000 for the fiscal year ending March 31, 2015.[191]

James Merte

Petitioner's sixteenth and final witness was James Merte, the Scio Township assessor. Mr. Merte gave his opinion that Petitioner occupies the subject property in furtherance of its charitable mission.[192]

RESPONDENT'S ADMITTED EXHIBITS

The following Exhibits were admitted:

D-1 (Marked by Dexter) Amy Heydlauff Deposition, vol 1-3[193]

D-6 Cindy Cope deposition exhibits[194]

D-7 Deposition Transcript of Angela Sargent[195]

D-8 Exhibits for Deposition Transcript of Angela Sargent[196]

D-11 Floor plan of subject[197]

D-14 Silver Maples of Chelsea Amendment to Articles of Incorporation[198]

D-15 Chelsea – Area Wellness Foundation 2013-14 Financial Report[199]

D-16 Chelsea – Area Wellness Foundation 2014-15 Financial Report[200]

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[187] T.6 p. 160; P-361 at 7
[188] T. 6 p. 163-164
[189] T.6 p. 182-183
[190] T.6 p. 183-184
[191] T.6 p. 185
[192] T.6 p. 226
[193] T.2 p. 236
[194] T.3 p. 168
[195] T.6 p. 120
[196] T.6 p. 120
[197] T.2 p. 141
[198] T.2 p. 166
[199] T.2 p. 176
[200] T.2 p. 177

D-20 Emails between Amy Heydlauff and Peg Bravo[201]

D-22 Article by Angela Sargent regarding opening of subject[202]

D-26 Grant expenditures[203]

D-27 Market Study for Wellness Center in Dexter, July 2010[204]

D-33 Purchase & Sale Agreement between DWC Investments and Petitioner dated 8/7/2013[205]

D-37 Snap Fitness website fitness score[206]

D-38 Liberty Athletic Club website re: Personal Training[207]

D-39 YMCA website re: personal training, fitness assessment[208]

D-40 BSA records for Silver Maples of Chelsea[209]

P-34 Grand Opening Flyer for subject[210]

P-44 FY 2014 Annual Operations Report[211]

P-45 FY 2015 Annual Operations Report[212]

P-51 Overhead View of 1st floor of subject[213]

P-52 Overhead view of 2nd floor of subject[214]

P-107 List of Community Programs for Chelsea & Dexter centers Winter 2013[215]

P-108 List of Community Programs for Chelsea & Dexter centers Winter 2014[216]

P-109 List of Community Programs for Chelsea & Dexter centers Winter 2014[217]

P-110 List of Community Programs for Chelsea & Dexter centers Fall 2014[218]

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[201] T.2 p. 249
[202] T.2 p. 250
[203] T.2 p. 191
[204] T.2 p. 251
[205] T.2 p. 172
[206] T.8 p. 29
[207] T.8 p. 31
[208] T.8 p. 33
[209] T.8 p. 36
[210] T.3 p. 23
[211] T.3 p. 47
[212] T.3 p. 47
[213] T.3 p. 54
[214] T.3 p. 54
[215] T.2 p. 237
[216] T.2 p. 237
[217] T.2 p. 237
[218] T.2 p. 237

P-112 Rate Card of Dexter Wellness Center[219]

P-136 Completer Analysis for Dexter Wellness Plan[220]

P-138 2013 Dexter Wellness Center Marketing Plan[221]

RESPONDENT'S CONTENTIONS

Respondents contend that Petitioner does not meet the occupancy requirement, nor the six factors required to qualify as a charity under *Wexford Medical Group v City of Cadillac*.[222] Respondents' contentions as to true cash value, state equalized value and taxable value are as follows:

Parcel Number: HD-08-06-455-001

Year	TCV	SEV	TV
2014	$10,344,200	$5,172,100	$5,172,100
2015	$10,648,400	$5,324,200	$5,254,853

RESPONDENTS' WITNESSES

Shawn Keough

Respondent's first witness was Shawn Keough, the Mayor of Dexter once it became a city, and Village President prior to Dexter's cityhood. He is also part of the Board of the Dexter Development Authority.[223] Mayor Keough testified as to the history of the property, the expenses incurred by Dexter and the DDA in providing storm sewers and Brownfield clean-up, and the expectations that the resulting property would be a positive return for the city on its investment. When asked about his frustration with the developer, (who also serves on the DDA), Keough testified:

> I have expressed frustration that the DDA has operated in good faith throughout the six years or so leading up from when the property was first conceived as a concept to when the redevelopment actually took place and that through all of the different twists and turns of this, that their investment to do something good and redevelop a property is going to result -- which is in furtherance of their mission to create TIF capture in the Downtown Development Authority could possibly

[219] T.2 p. 181
[220] T.6 p. 200
[221] T.6 p. 199
[222] 474 Mich 192; 713 NW2d 734 (2006)
[223] T.7 p. 11

> result in the largest building that's been built in Dexter in, I can't even tell you how long, being off the tax rolls. So, yeah.[224]

David Haffey, CPA

Respondents' second witness was David Haffey, who opined that it was a simple business decision to expand market rather than provide charity for Petitioner to provide their services at a loss.[225] He also testified that non-profits are a small part of his practice, with only 5-10% in terms of gross annual billings, and that he does tax returns for 6 to 10 non-profits every year.[226]

Christopher Renius

As its third witness, Respondents called Christopher Renius, the assessor for the City of Dexter, as well as other jurisdictions in Lenawee, Monroe and Washtenaw counties. Renius testified as having achieved a level III certification.[227] Renius opined that the facilities at Washtenaw Community College, the downtown Ann Arbor YMCA and Liberty fitness all had similar utility as the subject.[228] He also concluded that the rates charged by these three facilities were similar to the rates charged by Petitioner at the subject property.[229] Finally, he opined that the subject was taxable.[230] On cross examination, he answered "I don't know if I do or not" to the question of whether or not he had the expertise in evaluating a tax exemption for the subject under MCL 211.7o.[231]

Courtney Nicholls

Dexter's City Manager was called as Respondents' fourth witness. Rather than being called upon for her experience in running the City of Dexter and a member of the Michigan Local Government Managers Association,[232] she was called upon for her experience as a consumer of work out facilities, and as a member of Snap Fitness. Ms. Nicholls testified

[224] T.7 p. 77-78
[225] T.7 p. 122
[226] T.7 p. 121
[227] T.7 p. 124-125
[228] T.7 p. 128
[229] T.7 p. 131
[230] T.7 p. 132
[231] T.7 p. 143
[232] T.8 p. 24

regarding the facilities and programs at Snap Fitness, including its fitness assessment, as well as what she found on line regarding Liberty Fitness and the YMCA.[233]

Donald Darnell

Mr. Darnell was Respondent's fifth and last witness. Darnell testified that he is an attorney, a member of the Dexter DDA, and of the Dexter Twp. Zoning Board of Appeals. He also testified that he is a member of the Dexter Wellness Center.[234] He testified that he pays $115 per month for a membership at the subject for him and his wife, which he thinks "it's a big number."[235]

FINDINGS OF FACT

1. The subject is a 46,000 square foot fitness center located at 2810 Baker Road and is classified as commercial.
2. The subject contains areas identified as a gymnasium, two swimming pools, running track, aerobic and yoga studios, areas for free weights, weight machines, and cardiovascular equipment, a bicycle spinning area, and corresponding locker rooms. It also contains a child care area, massage rooms, small cafeteria area, and a conference room.
3. Petitioner also owns three other fitness centers; a facility in Chelsea, as well as smaller facilities in Manchester and Stockbridge.
4. For tax year 2014, the state equalized and taxable values were on the tax roll for $5,172,100.
5. For tax year 2015, the state equalized value was on the tax roll for $5,324,200 assessed value and $5,254,853 taxable value.
6. As to valuation of the subject, Petitioner filed a Motion to withdraw Count III of its Petition concerning valuation on June 6, 2014, and said Motion was granted by the Tribunal on July 21, 2014.
7. Petitioner was formed as a result of the take-over of Chelsea Community Hospital by Trinity Health Systems.

[233] T.8 p. 26-33
[234] T.8 p. 80
[235] T.8 p. 83-84

8. Petitioner was given a $25 million endowment as part of this merger, along with interest in Silver Maples, a retirement community, as well as lessor of a ground lease upon which sits a medical office.
9. Petitioner has a Board of Directors, and four full-time employees.
10. The subject property is owned by Petitioner.
11. The subject property is managed by Power Wellness Management LLC, which runs the facility and provides employees to work at the subject.
12. PWM also manages other centers throughout the country, including other centers owned by Petitioner.
13. Petitioner owns the furniture and equipment at the facility, and has a small amount of office space used exclusively by two of Petitioner's employees.
14. Petitioner's employees are on site at the subject property on average, 8 hours per week.
15. Since it opened, CWF's Board Members have been on site at the subject 633 times on board business.
16. Petitioner received acknowledgement from the Internal Revenue Service that it qualifies under the United States Tax Code as a 501(c)(3) charitable foundation.
17. Petitioner does not employ any medical personnel in their capacity as medical professionals.
18. Petitioner engages in various charitable activities in the area of wellness, for the geographic area described as Chelsea, Dexter, Manchester, Stockbridge and Grass Lake.
19. Petitioner's mission is to create a culture of wellness and foster sustainable improvements in the health of our communities through stewardship of our resources, innovative and collaborative grants, and engagement of our residents in the pursuit of healthy life choices.
20. Petitioner's stated vision is "[a]s healthiest communities in the mid-west, we choose to eat better, move more, avoid unhealthy substances and connect with others in a healthy way."
21. Petitioner's stated mission is to create a culture of wellness and foster sustainable improvements in the health of our communities through stewardship of our resources, innovative and collaborative grants, and engagement of our residents in the pursuit of healthy life choices.

22. For 2013-2014, Petitioner spent $2,600,750 for the Chelsea center, $2,161,091 for the subject Dexter center, $177,074 for the Manchester center, and $208,292 for the Stockbridge center. Out of total expenses for the fiscal year of $6,852,681, Petitioner expended $5,147,207 (75.1%) directly on the four centers.
23. For 2014-2015, Petitioner spent a total of $7,803,221, of which $5,421,316 (69.47%) was directly spent on the four centers, compared to $1,001,226 (12.83%) spent on awarded grants.
24. The subject has been certified by Medical Fitness Association ("MFA") as a medically integrated wellness center.
25. To be MFA certified, a facility must also offer certain types of programming for people with chronic illnesses and other health conditions.
26. Through its Next Steps program, Petitioner offers programs for people with chronic illnesses and conditions.
27. Petitioner's 50% ownership interest in the Silver Maples Retirement Community, as well as its ownership of a ground lease for a clinic were part of the merger between Chelsea Community Hospital and Trinity Health, and are incidental to Petitioner's operation.
28. Medical testimony in this case established that exercise in a supervised and community setting has proven more effective in terms of patient compliance in the prevention and treatment of cancer.
29. The Governor's Four-by-Four Plan states that 75% of $2.2 Trillion U.S. healthcare spending goes to treat chronic conditions.
30. Chronic conditions such as type II diabetes, heart disease, arthritis, stroke and dementia are consequences of obesity.
31. Currently in Michigan 2.5 million adults and 400,000 children are obese, many of whom already show signs of chronic illnesses.
32. Obesity is mainly driven by sedentary lifestyles and unhealthy eating habits.
33. The state and federal government suffers a burden when its population is "de-conditioned" in the form of higher Medicaid costs, and lost productivity.
34. During 2013 and 2014, the membership fees charged for membership at the subject were $69/month/individual, $46/month for each additional adult family member, and

$35/month for each child. For a family of four, the monthly charges to use the Property are $185.

35. Previously, CWF has charged an enrollment fee and a reactivation fee equal to $200-400.
36. Petitioner's rates are generally market rates when compared to comparable fitness centers in the area.
37. Petitioner's scholarship program has evolved, but requires recipients to use the facility twice a week, and ultimately, only gives a 50% discount over the regular fee.
38. The subject suffered a loss of $916,000 for the fiscal year ending March 31, 2014, and $758,000 for the fiscal year ending March 31, 2015.

CONCLUSIONS OF LAW

Where a tax exemption is sought, because tax exemptions upset the desirable balance achieved by equal taxation, they must be narrowly construed. *Michigan United Conservation Clubs v Lansing Twp*[236] See also *Michigan Baptist Homes & Dev Co v City of Ann Arbor*.[237] Petitioner is a non-profit organization recognized as such by the IRS under Section 501(c)(3) of the Internal Revenue Code. While having this recognition is a prerequisite to receiving a charitable exemption from property taxation, it is not the only requirement. Respondents have raised the overarching question in this case as to whether or not one can run a charity in a business-like manner and remain a charity under MCL 211.7o. The corollary to that question is whether or not a charity can remain in business if it is not professionally run.

MCL 211.7o(1) states:

> (1) Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

"Own and occupy"

The term "occupied" occurs twice in this definition. Per *Liberty Hill*[238] its use as part of the phrase of "owned and occupied" is a separate requirement from its later occurrence from "occupied . . . solely for the purposes for which that . . . institution was incorporated." Should

[236] 423 Mich 661, 665; 378 NW2d 737 (1985)
[237] 396 Mich. 660, 669–670; 242 NW2d 749 (1976)
[238] 480 Mich 44 (2008)

Petitioner fail to meet either occupancy test, it cannot qualify for an exemption under section 7o(1).

The occupancy requirement was one of the subjects of cross motions for Summary Disposition. The fact in this case giving rise to the occupancy issue is that Petitioner hired Power Wellness Management ("PWM"), a "for profit" professional management company to manage this facility, as well as similar facilities, both profit and non-profit. In denying both sides' motions, the Tribunal stated in its December 22, 2015 Order:

> Because exemption statutes are strictly construed, and *Liberty Hill* based its decision on the lack of "physical occupancy," the Tribunal holds that the use of a so called agent in the form of a separate "for profit" management company fails to satisfy the first "occupy" requirement of 7o(1) as set forth in *Liberty Hill*. PWM is not an "employee, member, or volunteer" of Petitioner. Rather, it is a separate, autonomous "for profit" corporation. The Tribunal declines to extend the definition of occupancy to include agents under these circumstances. As to whether or not Petitioner satisfies the regular physical presence requirement through other means, the Tribunal holds that this is a question of fact that requires a hearing to resolve. Accordingly, each party's Motion for Summary Disposition on the basis of occupancy per the *Liberty Hill* requirement is denied.

After 8 days of hearing, the Tribunal finds that Petitioner meets this requirement. *Liberty Hill* states in relevant part:

> The dissent would hold that a charitable institution may occupy property by using it without maintaining a physical presence there. Such an interpretation leads to one of the following two unsatisfactory conclusions: (1) a charitable institution can occupy property without actually being physically present or (2) a charitable institution need only use the property sporadically or perhaps even once to occupy it. Neither of these conclusions is consistent with proper meaning of the term "occupy." Rather, a charitable institution must maintain *a regular physical presence* on the property to occupy the property under MCL 211.7o. [Emphasis added].

Accordingly, the gravamen of the occupancy requirement is maintaining a *regular physical presence*.

Respondents argue that the main occupier is PWM which manages and staffs the facility. While it is true that PWM also occupies the facility, and it is also true that the Tribunal has found that PWM's agency with Petitioner is not enough to establish occupancy under *Liberty Hill*, the Tribunal does not hold that Petitioner must establish *exclusive* occupancy. Adoption of such a holding would prevent any charity from using professionals to manage their enterprises. No case

has been cited, nor does the Tribunal hold that there is a prohibition against a charity using outside professionals to achieve its goals. Despite Respondent's arguments to the contrary, charities need not be amateurishly run in order to be exempt under §7o.

At hearing, Matthew Pegouskie, an employee of Petitioner testified that he has an office at the subject property, at which he spends on average, 8 hours per week.[239] Amy Heydlauff testified that she has her own mailbox at the facility, as well as keys to the facility and unrestricted access. Angela Sargent, of PWM and director of the subject property testified that Ms. Heydlauff maintains an office at the facility and has regularly observed Ms. Heydlauff's presence throughout the facility.[240] Sargent also testified that Petitioner's healthcare advisory committee regularly meets at the subject, and CWF Board Members have been at the facility on Board business 633 times since it opened in 2013.[241] Finally, Petitioner maintains a regular physical presence in that all of the furniture and equipment present at the facility is owned by CWF, rather than PWM.[242]

Respondents also argue that Petitioner's presence is inadequate to meet *Liberty Hill* because it is confined to a couple of cubicles in the administrative area. The Tribunal finds this argument unpersuasive, and akin to a quantitative test strongly rejected by the Supreme Court in *Wexford*.[243] Further, none of the Respondents have cited a single case for the proposition that office size matters in meeting the occupancy requirement. To the contrary, four cases describing minimal occupancy were approvingly cited by the Supreme Court in *Liberty Hill*. [244] Accordingly, the Tribunal holds that Petitioner meets the occupancy requirement under *Liberty Hill*, and MCL 211.7o.

*"*Nonprofit charitable institution*"*

The second requirement under §7o is that the claimant be a nonprofit charitable institution. The six tests laid out to determine whether a corporation is a charitable institution are

[239] T.5 p. 140
[240] T.6 p. 25-27
[241] T.6 p. 28
[242] T.3 p. 96-97, Heydlauff's response to question from bench.
[243] While the Supreme Court in *Wexford* explicitly rejected a quantitative test for the amount of charity necessary to qualify, the decision's stated rationale makes clear that no quantitative test can found anywhere in §7o.
[244] *Detroit Young Men's Society v Detroit*, 3 Mich 172 (1854), *Webb Academy v Grand Rapids*, 209 Mich 523 (1920), *Gull Lake Bible Conference Ass'n v Ross Twp*., 351 Mich 269 (1958), *Oakwood Hosp Corp v STC* 374 Mich 524 (1965)

contained in *Wexford Medical Group v. City of Cadillac*.[245] A claimant must meet all six of these tests in order to qualify as a nonprofit charitable institution. A failure to meet any of the six tests disqualifies a claimant from being considered a charitable institution and receiving a property tax exemption under §7o. The tests are as follows:

> (1) A "charitable institution" must be a nonprofit institution.
> (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.
> (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
> (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
> (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
> (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

While the Supreme Court describes six discreet factors, in practice these factors usually overlap and are often different facets of the same attributes. Nonetheless, an analysis of whether an organization qualifies as a charitable institution requires a discussion of each of these factors, which also provide a proper frame work in which to discuss Petitioner's relevant attributes. In reviewing the six factors found in *Wexford*, the Tribunal holds while Petitioner meets factors 1, 2, 4, 5 and 6, it fails to meet test 3. While failure to meet any of these tests is dispositive, the Tribunal's analysis of each factor is set out below for clarity and completeness for judicial review.

(1) A "charitable institution" must be a nonprofit institution.

It is uncontested that Petitioner meets this first test. Petitioner's Restated Articles of Incorporation state in relevant part:

> The purposes for which the Corporation is organized are:
> a. To operate exclusively for the purposes set forth in Section 501(c)(3) of the Internal Revenue Code . . . .[246]

[245] 474 Mich 192, 215; 713 NW2d 734 (2006)
[246] Exhibit P-189

Petitioner also received an approval letter from the Internal Revenue Service dated April 28, 2009 confirming its 501(c)(3) status.[247] Accordingly, Petitioner meets the first test.

(2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

Respondents argue that the word "charity" is not found in Petitioner's Articles or Bylaws. While true, the Tribunal does not find that omission to be dispositive. The Revised Articles of Incorporation and the Bylaws of Petitioner both state its purpose is:

> To support significant, measurable, and sustainable improvements in the health and wellness of residents in the Service Area and in furtherance of the development of strategies to ensure access to health services to those in need.[248]

While not using the word "charity", this purpose is clearly a charitable one.

While the articles bear relevance to whether the use of the property qualifies as charitable, they are not definitive. In *Mich Baptist Homes Dev Co v City of Ann Arbor,*[249] the Supreme Court looked beyond a petitioner's articles of incorporation, which announced "benevolent, charitable and general welfare purposes," concluding that the facts did not support this characterization. Similarly, in *Association of Little Friends v. Escanaba,*[250] Petitioner was organized in part as a preschool. The Court of Appeals held that the Tribunal must consider the charitable or benevolent nature of Petitioner's activities, and not focus strictly upon what is stated in the Articles of Incorporation. Accordingly, the Tribunal must look beyond Petitioner's organizing documents to determine whether Factor 2 has been met.

Supporting Factor 2 is its creation story, as well as many of its activities. Petitioner was created by the merger of two hospitals, Chelsea Community Hospital, and Trinity Health – Michigan d/b/a Saint Joseph Mercy Health System.[251] That agreement created CWF as a separate entity from Chelsea Hospital, and endowed it with $25,000,000 "to be used for health and wellness initiatives and other community based initiatives within the service area . . . .[252]

Petitioner's vision and mission are stated in its 2014 Community Update. Under "Our Vision," this document states, "[a]s healthiest communities in the mid-west, we choose to eat

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[247] Exhibit P-198
[248] Exhibits 189 and 190
[249] 396 Mich 660, 671; 242 NW2d 749 (1976)
[250] 138 Mich App 302, 310; 360 NW2d 602 (1984)
[251] Exhibit P-185
[252] Id., p. 002035

better, move more, avoid unhealthy substances and connect with others in a healthy way."[253] Under "Our Mission," the document states:

> To create a culture of wellness and foster sustainable improvements in the health of our communities through stewardship of our resources, innovative and collaborative grants, and engagement of our residents in the pursuit of healthy life choices.[254]

Petitioner called 16 witnesses at hearing that testified to Petitioner's charitable activities. CWF's first witness, Amy Heydlauff, CEO of Petitioner gave an overview of many activities that further its stated vision and mission. She testified as to comprehensive wellness plans it put forth as part of its 5 Healthy Towns initiatives.[255] CWF funds numerous programs, which it calls "interventions" which support its vision. For example, it funded Safe Routes To School, funded a Bike Lending Program, funded installation of bike racks and various exercise programs throughout Chelsea, Dexter, Manchester, Grass Lake and Stockbridge to encourage area citizenry to move more. For the same towns, CWF funded various programs to improve nutrition such as Healthy Cooking classes, Michigan Farm to School programs, Farmer's markets. In support of its vision of helping the 5 towns avoid unhealthy substances, it funded the SRSLY program aimed at preventing and reducing youth substance abuse, along with the Big Red Barrel Program, allowing for the safe disposal of unused medication. As for its fourth element of having people connect with others in a healthy way, Petitioner sponsored various classes and physical activities.[256] The Tribunal finds that all of these activities are charitable, and support Petitioner's claim that it is organized chiefly, if not solely for charity.

Respondents argue that other activities engaged in by Petitioner, unrelated to running the facility disqualify Petitioner from this factor. Specifically, Respondent argues that owning 50% of a non-profit retirement home disqualifies Petitioner, as does its ownership of land upon which a medical office building sits, along with its role of guarantor in the transaction that formed Petitioner in the first place, disqualify it from being organized chiefly, if not solely for charity.

The testimony of the Hon. Patrick J. Conlin, Judge of the 22nd Circuit Court was decisive in undermining this argument. Judge Conlin testified that he was on the Board of Trustees of

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[253] P-356, p. 006402, T.1 p. 103-104
[254] Exhibit P-356, p. 006402
[255] T.1 p. 127-184
[256] Exhibits P-257 through P-275. See also testimony of Jeffrey Wallace, T.5 p. 157-158.

Chelsea Community Hospital for 10 years, and was Chairman of the Board at the time that Chelsea merged with St. Joseph Mercy Health System. He testified that there was resistance to having St. Joseph Mercy Health System, a Catholic institution taking over Silver Maples, which was 50% owned by the United Methodist Retirement Community, and 50% by Chelsea Community Hospital. Assigning Chelsea's interest to Petitioner as part of the merger provided a work around. Further, Judge Conlin testified that Petitioner does not benefit from any cash surplus earned by Silver Maples, nor does it remain a guarantor on Silver Maples' debt.[257] Judge Conlin testified further that there were similar concerns by the U of M Family Practice that ownership by a Catholic hospital might limit its practice in the areas of women's health and family practice. Consequently, Petitioner wound up as holder of a ground lease where the U of M Family Practice medical office building sits on the former Chelsea Hospital grounds.[258] These instances of ownership or guaranty are not central to Petitioner's mission, but were merely incidental to the merger.

Of central importance to Petitioner, and to this proceeding is Petitioner's chief activity of funding what it terms health and wellness centers, and which Respondent refers to as recreation centers. (The Tribunal will refer to these buildings as "centers"). As is evident from Petitioner's financial statements, an overwhelming amount of Petitioner's expenditures for fiscal years 2013-2014, and 2014-2015 are for the four centers, including the subject property. For 2013-2014, Petitioner spent $2,600,750 for the Chelsea center, $2,161,091 for the subject Dexter center, $177,074 for the Manchester center, and $208,292 for the Stockbridge center. Out of total expenses for the fiscal year of $6,852,681, Petitioner expended $5,147,207 (75.1%) directly on the four centers. This does not include indirect expenses for management and the like. In contrast, Petitioner spent only $751,178 in grants awarded, (10.96%).[259] Similarly, for 2014-2015, Petitioner spent a total of $7,803,221, of which $5,421,316 (69.47%) was directly spent on the four centers, compared to $1,001,226 (12.83%) spent on awarded grants.[260] Clearly, Petitioner spends the overwhelming majority of its expenditures on the four centers. Accordingly, activity at the centers is central to Factor 2.

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[257] T.4 p. 141-144
[258] T.4 p.144-148
[259] P-55, p. 001548
[260] P-250, p. 002812

Respondents claim that the physical lay-out of the subject[261] and equipment present at the subject conclusively show that the subject property is nothing more than a recreation center, perhaps more upscale than some of its private competition, but essentially offering the same opportunities as Snap Fitness, Liberty Fitness, and the local YMCA.[262] Dexter's City Manager Courtney Nicholls testified regarding the facilities and programs at Snap Fitness, including its fitness assessment, as well as what she found on line regarding Liberty Fitness and the YMCA.[263] This conclusory testimony failed to contradict the testimony of Brian Hummert, CEO of PWM, who testified as to what a wellness center provides over a gym. Some of those differences are more handicapped parking spaces closer to the Center, and a porte-cochere allowing for drop off of deconditioned persons; double-entry doors, space for wheel chairs, wider hallways, ADA compliant lockers, towel service, ADA compliant showers. Two or three pools set to different temperatures for aquatic exercise, and assisted changing rooms are another difference. The walk/jog track at the subject was designed so that users can walk in pairs, and can use walkers. The track is longer, so it has less turns per mile and is cushioned. Other differences concern types of equipment, cleanliness standards and staff training.

While the physical facility may have some relevance as to whether a building is charitable under §7o, the Tribunal holds that the physical facility itself is not determinative as to whether it should be considered charitable. If this were not so, no office building could ever be exempt, even if used to administer a charity, hospital, or school. A public non-profit and a private for profit hospital may have identical facilities, yet the former may be charitable, while the latter would not be classified as such. Even residences may or may not be charitable, depending upon their usage.[264] The factors that are used to determine whether or not a piece of property is charitable concern how the facilities are used and administered. Similarly, a for-profit, or private camp ground, or retreat may or may not be exempt, depending upon its policies and usage.[265]

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[261] P-51 and P-52
[262] Exhibits D-37, D-38 and D-39.
[263] T.8 p. 26-33
[264] *Oakwood Hosp v STC*, 374 Mich 524; 132 NW2d 634 (1965).
[265] See for example, *Gull Lake Bible Conference Ass'n v. Ross*, 351 Mich 269; 88 NW2d 264 (1958).

In the present case, Petitioner has shown that the subject is a medically integrated wellness center, certified by the Medical Fitness Association ("MFA").[266] A certified medically integrated wellness center is different from a traditional gym or fitness facility. In order to be certified by the MFA, a wellness center must have, among other things, at least three clinical fitness programs for people with chronic medical conditions such as heart disease, pulmonary disease, cancer, chronic pain, orthopedic and/or neurological problems, cerebrovascular disease "stroke," sports injury prevention and rehabilitation neutral counseling, among others. It must offer preventative programs to not only members, but to the community at large, especially the disabled population.[267] It must also offer certain types of programming for people with chronic illnesses and other health conditions.[268]

Petitioner claims that the activities at the centers are overall charitable. In support, Petitioner points to the testimony of Jo Mayer, who is a member of the Stockbridge Area Wellness Coalition.[269] Ms. Mayer testified that the Stockbridge Coalition was offered $200,000 and decided to use all of it to fund a wellness center. She pointed out that Stockbridge has a high incidence of obesity, and the resulting heart disease and diabetes. She testified that 80% of Stockbridge was overweight or had high blood pressure, and the community had a very large unmet need for such a facility. Amy Heydlauff testified that neither the Stockbridge, nor Manchester center were ever likely to break even.[270] There was also testimony regarding activities such as senior swim, and the Next Steps program, an 8 week long medically integrated fitness program with various health challenges. Access to this program comes from referrals from Physicians and other medical practitioners.[271] Brian Hummert, testified that it costs the facility $220 per participant, even though participants are only charged $99.[272]

Petitioner further bolstered its case with the testimony of Anne Kittendorf, M.D., a practicing family physician, and a faculty member of the University of Michigan medical

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[266] The MFA is not just a trade group – it has roughly 1,300 members including prominent hospitals such as Scripps in California, Northwestern Medicine in Chicago, Rush Hospital, Loyola, and Cleveland Clinic, among others. These prominent hospitals are recognizing that the industry needs a place for their patients and people with chronic disease to go. Jan 11 Tr. at 153.
[267] T.6 p. 160; 162-163; P-361 at 7
[268] T.6 p. 160; P-361 at 7
[269] T.5 p. 8
[270] T.2 p. p. 204.
[271] Exhibit P-4
[272] T. 6 p. 163-164

school.[273] Dr. Kittendorf testified regarding the comparative impact of prescribing exercise versus a statin:

> So let's say over -- over two years I -- I advise 100 people to go to the Wellness Center, 50 take me up on it, and 25 end up having sustained lifestyle benefit from that. Okay? So 25 out of 100 is a fourth, so that means I've had to counsel 100 people to positively impact 25 people, which means my number needed to treat is four. And we know by evidence that exercise, when we're thinking about things like preventing heart disease or heart attack, exercise is as effective as putting people on a statin medication. So I'm able to influence more people's health through exercise.[274]

Dr. Kittendorf also agreed that it is important to refer her patients to a medically integrated facility because "it provides a different layer of oversight and protections for our participants as well as helping the community at-large."[275] As to the benefits of the Next Steps program, she gave an example of an elderly patient becoming stronger through "pre-hab" and was able to get home within a week of surgery, saving health care dollars. She further testified:

> And I am firmly convinced it's because he went into surgery with a much better health profile due to his muscle strengthening and balance strengthening that he had. So in and of itself, I know that that saved the system thousands and thousands of dollars. But if we're talking about an elderly person with a hip fracture, not only is there a 50 percent mortality rate for patients who fall and have a fracture within six months, but on top of that the healthcare costs are astronomical, I would guesstimate $100,000 for an elderly person who falls and breaks a hip, and then often long-term costs because they often end up in long-term care facilities.[276]

Andrew Eisenberg, M.D., an Oncologist with 37 years of experience, educated at the University of Michigan,[277] also testified that exercise in a supervised and community setting has proven more effective in terms of patient compliance in the prevention and treatment of cancer.[278] Dr. Eisenberg stated:

> There are studies that have shown that a supervised exercise program is more effective than just telling somebody, "Go out and exercise." You know, the problem with people with -- that are sick or have an illness, they don't always comply with what the recommendations are. You know, if I prescribe a pill, and the patient doesn't take it, it doesn't do them any good. If I just tell somebody "Go out and exercise", and they don't do it, then it's not going to do them any good.

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[273] Curriculum Vitae, Exhibit P-364
[274] T.4 p. 51-52
[275] T.4 p. 69
[276] T.4 p. 76-77
[277] T.4 p. 153
[278] T.4 p. 167

> So compliance is an issue, and if there is a supervised program, there's evidence to suggest that compliance is better, and the person is more likely to benefit.[279]

In support, of his testimony, Dr. Eisenberg cited several articles from medical journals.[280]

Petitioner also argues that Petitioner's health fitness assessments, and risk stratifications creates access to persons over 50, and persons with higher risk stratifications. The Tribunal finds that the business of owning and funding these facilities is consistent with Petitioner's overall mission of "eat better, move more, avoid unhealthy substances and connect with others in a healthy way," which are charitable goals, and thus meet Wexford Factor 2.

(4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.

The discussion above under Factor 2 is also relevant in determining whether the subject meets Factor 4. The analysis under Factor 2, along with additional analysis set forth below convinces the Tribunal that Factor 4 has also been met by Petitioner.

The Tribunal heard uncontroverted testimony by Dr. Kittendorf, as well as by Dr. Eisenberg, that supervised exercise as found in the Next Steps program relieves suffering and disease constraint. The Tribunal has already ruled in its December 22, 2015 opinion, that because Petitioner is not a medical institution and employs no medical professionals, it does *not relieve people's bodies from disease, suffering or constraint*, as that term has been defined by previous precedent, and the Tribunal is reluctant to extend that phrase outside of the healthcare setting. That phrase originated in the 1867 case of *Jackson v Phillips*,[281] and was describing medical care using the vernacular from the mid-19th century. However, after 8 days of hearing, it is the Tribunal's conclusion that Petitioner's activities *otherwise lessen the burdens of government*.

Respondent argues that the subject is nothing more than a recreational center, and that recreation is not a charitable purpose. As discussed above under Factor 2, Petitioner's activities are broader than providing a gym. Further, Respondent's argument that there is no governmental duty to provide recreation, (i.e., the gun club cases),[282] while true, is off target. The government

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[279] T.4 p. 157-158
[280] T.4 p. 160-161
[281] 96 Mass (14 Allen) 539 (1867)
[282] *North Ottawa Rod & Gun Club v. Grand Haven Twp*, unpublished opinion per curiam of the Court of Appeals issued August 21, 2007 (Docket No, 268308); *Bridgeport Gun Club v. Bridgeport Twp*, 19 MTT 59 (2011).

does suffer a burden when its population is "de-conditioned" in the form of higher Medicaid costs, and lost productivity. As former Michigan House Speaker Paul Hillegonds testified, the Michigan Constitution[283] sets forth the state's role in public health and general welfare.[284]

These observations have spurred Michigan's governor to put forth his Four-by-Four plan, which sets forth three of the same four healthy behaviors as Petitioner's vision.[285] Counsel had the following exchange on Direct Examination with Dr. Kittendorf regarding this plan:

> "The consequences of obesity are Type 2 diabetes, heart disease, arthritis, stroke and dementia. Currently in Michigan 2.5 million adults and 400,000 children are obese, many of whom already show signs of chronic illnesses. Unnecessary suffering is being caused by obesity, which is mainly driven by sedentary lifestyles and unhealthy eating habits." Do you agree with that?
> A: One hundred percent, yes.
>
> Q: And then the paragraph just below that, next to the chart says, "According to the CDC, 75 percent of total healthcare expenditures are associated with treating chronic diseases. If Michiganders reduced their BMI rates to lower levels and achieved an improved status of health, the State could save over $13 billion annually in unnecessary healthcare costs." Do you agree with that?
> A: Yes. Critical information . . . . I'll just mention we have a looming crisis with our baby boomers aging, and making sure it's critically important for us to engage in wellness and infrastructure and community health and wellness and opportunities such as what our Foundation is doing. As we have this massive influx, age brings illness in and of itself. So these numbers are very scary and they're bound to get scarier without intervention, so [286]

The Four-by-Four Plan also mentions that 75% of the $2.2 Trillion the U.S. spends on healthcare goes to treat chronic conditions.[287]

Clearly, prevention of a healthcare apocalypse as the boomer generation ages, and younger generations suffer from obesity is a problem that the state, as well as the Federal government will be burdened with in the form of Medicare and Medicaid expenses, as well as lost productivity. Centers such as the subject that address the non-covered ailment of de-conditioning help reduce the burden of government. Accordingly, Petitioner meets the test under *Wexford* Factor 4.

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[283] Const 1963 Art IV Section 51
[284] T.4 p. 183-184
[285] Exhibit P-240
[286] T.4 p. 102-104
[287] P-240 p. 003469

(3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.[288]

Respondents argue that Petitioner discriminates on the basis of the ability to pay. Petitioner charges fees for membership to use the subject center. During 2013 and 2014, the fees were $69/month/individual, $46/month for each additional adult family member, and $35/month for each child. Previously, CWF has charged an enrollment fee and a reactivation fee equal to $200-400,[289] but eliminated that fee to "eliminate barriers."[290] For a family of four, the monthly charges to use the Property are $185. These rates were and are generally market rates when compared to comparable fitness centers in the area.[291] CWF introduced no evidence to show that the rates charged to its members were "substantially less or indeed less at all than the market rates."

A charity is not required to give away its services. It is entitled to charge for them, which will be discussed in detail regarding Factor 5. The test under Factor 3 *is whether or not the rates are a barrier preventing it from serving any person who needs the particular type of charity offered.* Petitioner argues that its guest program, where free passes are liberally handed out meets Factor 3. However, said passes are limited to three uses a year per customer.[292] Accordingly, guest passes are inadequate to meet Factor 3.

Petitioner presented evidence of an evolving scholarship program. In its written scholarship policy dated 4/23/14, an individual providing a doctor's note stating the health

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[288] The Tribunal notes that Factor 3 as it is currently understood under case law may in the near future be substantially modified. The Supreme Court on April 1, 2016, directed the Clerk to schedule oral argument on whether to grant application or take other action in *Baruch SLS, Inc v. Tittabawassee* SC Docket No. 152047. The Order states:

> The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether *Wexford Medical Group v City of Cadillac*, 474 Mich 192 (2006), correctly held that an institution does not qualify as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis"; (2) if so, how "discriminatory basis" should be given proper meaning; (3) the extent to which the relationship between an institution's written policies and its actual distribution of charitable resources is relevant to that definition; and (4) whether, given the foregoing, the petitioner is entitled to a tax exemption.

Rather than speculate as to what the Supreme Court will finally hold, the Tribunal analyzes Factor 3 in this Final Opinion and Judgment as it is currently understood.

[289] P-173, p. 001613 Cindy Cope deposition; Rate card, Exhibit P-112 (Cope dep. Exhibit 13).

[290] T.2 p. 97, testimony of Amy Heydlauff

[291] Affidavit of Chris Renius, City of Dexter Assessor, and attached study of fitness center market, attached as Exhibit P-225, and Exhibit D-1, p. 225-6 Heydlauff deposition

[292] T.3 p. 43

benefit of a membership at the center and who has income at or below 200% of poverty guidelines, (with proof), will be allowed to enroll in the Next Steps Program at no cost for 8 weeks. After the expiration of the Next Step program, an applicant may enroll as a member at one half the usual rate for the next 3 months, provided that they use the center a minimum of twice a week. The policy goes on to state that usage will be monitored, and if the member does not meet the twice a week requirement, the membership will be terminated.[293] A flowchart of the program was also provided, that allows for 2 months at the Next Steps program, plus an additional free month, or 2 free months of General Membership. After the expiration, additional months are allowed at 50% off the rate, with on-going review of usage, and an annual review of financial need.[294]

As to what program was in effect in 2014, the following exchange on Direct Examination between counsel and Cindy Cope is illustrative of the confusion:

> Q: . . . In 2014, if an applicant for scholarship applied, got the scholarship, wanted to continue for additional months on scholarship, and couldn't afford to pay, would that person be turned away necessarily?
> A: No. The scholarship guidelines was a work in progress. It changed regularly for about a six-,eight-month period. Every time we would just -- we'd have discussions and then it would change, but the documents didn't necessarily reflect all of the changes. So, it even -- it even changed from this version.· It became -- and I don't even know what the date was, but within that time frame it included half off your dues on a regular -- on an ongoing basis. So depends on what time of the year in 2014. I don't know how to answer that question.
>
> Q: Well, are you aware of anybody who had applied for a scholarship, got [the] scholarship and then asked to continue the scholarship and was -- and was refused?
> A: No, I'm not aware of that.[295]

Assistant Director Angela Sargent testified as to her understanding of the scholarship policy:

> So there are two pathways in which they can receive a scholarship; one is through our Next Steps Program, which is an eight-week program. If they complete that, then they would qualify for one additional month and then 50 percent off dues after that, or they can also just join through general membership, they would receive two months and then 30 percent dues thereafter.

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[293] Exhibit P-41
[294] Exhibit P-105
[295] T.3 p. 139-140

Q: And, "For thereafter," is there a point at which that terminates?
A: As long as they meet the usage requirements, there would be -- no –

Q: Okay. What are the usage requirements?
A: They have to meet minimally two times a week.

Q: Why do you impose that -- why does the Foundation impose that requirement; if you know?
A: Well, there's studies that show that regular exercise and attendance is helpful for their health; and then there's also, you know, if they're not using it, we would want someone else to take advantage of it.

Q: Now, if somebody missed a day or even two days for various reasons, you know, in an accident, lost their job, whatever the reason may be, if that person missed one day or two days of the required sessions that they have to attend, would they be kicked out of the program?
A: No.

Q: Do you know of anybody who has been kicked out of the program for that reason?
A: No.

Q: By the "Program," I mean the scholarship program?
A: Correct.

Q: Now, if somebody were to come into the Dexter Wellness Center after the two months of free membership under the general membership, and said, "I can't afford the 50 percent. I just don't have the money;" is it your understanding that that person would not be permitted to participate in the scholarship program?
A: No, we would work with them.

Q: Do you know whether the scholarship program has a provision for extenuating circumstances?
A: No.

Q: You don't know whether they have that?[296]
A: Oh, I -- yes, there are -- yes, if –

Q: So if I were to use, as an example, somebody came in and said, "I just can't afford to pay the 50 percent. I got this situation where I lost my job, I got medical bills, I can't afford it."· In your mind, would that be an extenuating circumstance?
A: We would work with them, yes.[297]

[296] Testimony of Amy Sargent, T.6, p. 29-30
[297] T. 6 p. 30-33

Director Amy Heydlauff also testified regarding the scholarship program, indicating that failure to use the facilities twice a week would be excused for extenuating circumstances.[298] She also testified that CWF would consider keeping members on scholarship who make more than 200 times the poverty level.[299] As to the importance of scholarships, Heydlauff stated:

> As I said, we find a way. So our goal is to get as many people in the door as possible, and it doesn't matter what their circumstance is. Our goal is to get as many people in as possible. And it is -- it is actually -- actually -- actually, people who have lower incomes, and lower education levels, have a tendency to have poorer health, so those are exactly the kind of people that are the most difficult to reach, so we try -- in as many ways as possible -- to reduce those barriers to get those people in the door. They're the very hardest people to get into a program, so we want to make it as easy as possible for them to get into the program --[300]

Respondent points out that there were no scholarship recipients of any type on or before December 31, 2014.[301] Respondent also points out that those who do qualify for a scholarship are, unlike a general member, subject to a usage requirement of twice a week. The purported reason for this requirement, making sure that only those who will use the facility receive the scholarship as a better use of scholarship funds, is of questionable validity when there is an unlimited amount of scholarships available. [302] Finally, Respondent shares the observation that the written requirements of the current scholarship program, per Petitioner's Exhibits 41 and 105 state that someone can get two or three months of membership free, and then they will be offered a membership at the half-rate provided they continue to meet the financial and usage requirements. The public is not informed that if they cannot afford the half-rate, they may get another option.[303]

The issue under Factor 3 is not whether, or how many persons take advantage of Petitioner's scholarship program. Rather, the issue is whether Petitioner is offering its services on a discriminatory basis *by choosing who, among the group it purports to serve, deserves the services.* While Petitioner's CEO appears to the Tribunal to be genuinely interested in providing access to everyone, the evidence shows that persons with financial difficulties still have extra

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[298] T. 2 p. 38
[299] T. 2 p. 38-39
[300] T. 2 p. 40
[301] Exhibit P-115 shows no scholarships were given out in 2013 or 2014 at the Dexter facility.
[302] Testimony of Amy Heydlauff, T.3 p. 33
[303] T.3 p.182

hoops to jump through to be able to overcome financial barriers to use the facility. The written policy places requirements upon scholarship members that are not present for those who can pay the fee. Not only must prospective scholarship applicants verify their financial status, they must use the facility at least twice a week, or be in danger of losing their ability to use the facility.

The policy itself does not provide for on-going free membership, but rather, a 50% rate. Originally, that discount was also time limited to two months. Although the time limitation has apparently been removed in the latest policy articulation, a 50% rate would likely continue to limit those among the group Petitioner purports to serve, deserves the services. As Amy Heydlauff testified, the poor tend to have poorer health.[304]

While it is laudable that Petitioner has eliminated the $200 initiation fee, and expanded (at least in theory) discounted services, the Tribunal finds that Petitioner failed to meet its burden in proving that Petitioner *serves any person who needs the particular type of charity being offered.* Petitioner is correct in stating that Respondents have failed to show a single case in which a potential member was turned down or terminated for lack of payment. What cannot be proven is how many low income persons never bothered to apply for membership because its costs, and written policy were prohibitive. Regardless, the burden is on Petitioner to show that its policies do not discriminate against a particular group, in this case, low income persons. The Tribunal finds that the policies as written, and even in modified form as testified to, do not meet this burden for Factor 3.

Related to Factor 3 is Factor 5, which states:

(5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

The following quote from *Wexford* shows the interplay between Factors 3 and 5:

> While "[a] corporation does not qualify for a tax exemption merely because it is structured to be nonprofit and in fact makes no profit," "[b]y the same token, a nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services."[305]

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[304] T.2 p.40

[305] *Wexford*, at p. 210, quoting from *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc., v. Sylvan Twp.*, 416 Mich 340, 348–349, 330 NW2d 682 (1982)

Respondent argues, and Exhibit D-27 supports its claim that professionals set the pricing for membership at the subject property. This exhibit is a marketing study prepared by Meritage Health Strategies, which identified needs, demographics, etc. for the successful launching of a wellness center in Dexter. Again, Petitioner sought to run this charity in a business-like manner and used professionals to determine its market, and what the market will bear. However, the law does not require a charity to be poorly run, nor prohibits it from being well-run. Further, Amy Heydlauff testified how this data was put to use:

> I think lots of models show that there is a curve at which people aren't willing to pay for a service. We're not willing to reach that point. Our goal is to have people in the centers using the centers for a health and wellness purpose. So what the market could bear, in this case, was the market for health and wellness services at our Wellness Center. We didn't want to put ourselves at a price point that potential members weren't willing to come to the Center, because our goal is to have as many people in the door as possible.[306]

Petitioner also argues, and its financial statements show that the Dexter facility loses money. Respondent counters that it plans to eventually make a profit, and will do so if its membership rises to a certain level. Respondents also called in David Haffey CPA to bolster this argument, and to indicate that losing money was part of a plan to expand market share.[307] However, it was clear that Haffey's experience and expertise concerned "for profit" companies rather than charities.[308] Accordingly, the Tribunal does not assign any weight to Mr. Haffey's opinion.

Respondents also argue that two of Petitioner's witnesses testified that Petitioner hoped to break even, or perhaps make a profit in the future to further its mission. The Supreme Court noted the following facts in *Wexford*:

> Overall, petitioner suffered financial losses in 1999, 2000, and 2001 of $575,000, $731,000, and $673,000, respectively. These losses were subsidized by its parent companies. And while petitioner's goal was to eventually become profitable, its agent testified that any surplus would be invested back into the organization in accord with its statement of purpose.[309]

The Court in *Wexford* had the following to say about charities making a profit:

> Respondent argues that petitioner's goal of profitability negates its claim that it is a charitable institution. We find that argument hollow. Petitioner's bylaws do not

[306] T. 2 p. 238
[307] T.7 p. 122
[308] T.7 p. 121
[309] *Wexford,* p. 198

> allow any individual to profit monetarily from the petitioner's clinic; thus, "profitability" has a different meaning for this institution than it would for an entity whose goal it was to reward its agents or shareholders with profits. And the idea that an institution cannot be a charitable one unless its losses exceed its income places an extraordinary—and ultimately detrimental—burden on charities to continually lose money to benefit from tax exemption. A charitable institution can have a net gain—it is what the institution does with the gain that is relevant. See *R. B. Smith Mem. Hosp., supra* at 36, 41, 291 N.W. 213 (1940). When the gain is invested back into the institution to maintain its viability, this serves as evidence, not negation, of the institution's "charitable" nature.[310]

As in *Wexford*, Petitioner's witnesses testified that any money would be devoted back to mission spending.[311]

Respondent did not show, or indeed even argue that Petitioner's charges were in excess of what is needed for successful maintenance. For instance, it failed to present evidence that Petitioner's officers or trustees were over-compensated. Other than showing that its Board has free use of the facility, it failed to establish any compensation for the board member's time and responsibility.

Recently, in an unpublished decision, the Court of Appeals reversed the Tribunal's finding that Factor 5 was not met by Petitioner under similar circumstances to the present case, where operational losses were shown by the Petitioner, and Respondent relied upon the charges used by similar facilities. The Court of Appeals stated:

> Respondent has not rebutted the other evidence noted previously, and the Tribunal's focus on the testimony about other facilities was therefore misplaced. Petitioner's evidence was sufficient.
>
> Equally in error was the Tribunal's speculative disregard of petitioner's operating losses. On this point, the Tribunal justified ignoring those losses because petitioner incurred them in the early stages of operating Stone Crest. But the record does not support this conclusion. Rather, as already explained, the record reveals that increased participation in the income based program caused at least part of petitioner's financial bleeding. Petitioner simply did not charge more than needed for its successful maintenance, and the Tribunal's reasoning to the contrary is purely conjecture.[312]

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[310] *Wexford*, p. 217-218

[311] Testimony of Amy Heydlauff, T.2 p.79; Testimony of Board Member Scott Broshar, T.4 p. 40-41, Anne Kittendorf, T.4, p. 121-122

[312] *Baruch SLS Inc v Tittabawassee Twp*, [majority opinion], unpublished opinion per curium of the Court of Appeals, issued April 21, 2015 (Docket No. 319953), Slip Op p. 6-7. Application for Leave pending, Oral Argument Ordered April 1, 2016, SC Docket No. 152047

While an unpublished decision of the Court of Appeals is not stare decisis, and the above quote is *obiter dicta*, the reasoning in the majority opinion is persuasive and in line with *Wexford*. A charitable institution can take in more money than it spends. The relevant inquiry is what Petitioner does with any excess. Accordingly, the Tribunal finds that Petitioner prevails on Factor 5.

(6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

The sixth requirement under *Wexford* is not so much a requirement, as a declaration that there is no specific monetary threshold. Rather, if the overall nature of the institution is charitable, it is a charitable institution. In *Wexford*, the Court found that Petitioner qualified as a charitable institution, even though a very small percentage of persons it treated were treated without charge. Rather, the Court held that by its very mission, a hospital qualifies as a charitable institution. As with *Wexford*, Respondents have shown that scholarships for memberships are very limited. In fact, no one took advantage of Petitioner's scholarship program in 2013, (its first partial year of existence), and few took advantage of the program in 2014. However, Petitioner has shown through the testimony of Angela Sargent, a wide usage of guest passes, along with memberships and equipment for the benefit of the Service Area, including: donations to Chelsea Community Schools, $3,787;[313] 10 guest passes to Dexter Cooperative Preschool, $100;[314] six-month membership to Chelsea Community Hospital annual auction, $414, among others.[315] Amy Heydlauff testified that the subject also provides free meeting space for community organizations and programs such as senior health week programs during which occupational therapists were brought in to test seniors' vision and reflexes to assess the appropriateness of their continuing to drive.[316] The subject also provides free facilities for Dexter High School health class students and their parents so that the students can meet their physical activity curriculum requirement.[317]

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[313] T.6 p. 96; P-129 (Quarterly Program Costs)
[314] T.6 96; P-129
[315] T.6 p. 96-97; P-129
[316] T.2 p. 57-59
[317] T.2 p. 67

Additionally, Petitioner provides access to its centers to a number of other nonprofit groups and organizations. For example, Peggy Cole, Director of the St. Louis Center, a Chelsea-based residential community for children and adults with developmental disabilities, testified that Petitioner funds its Fitness for Life program.[318] The Fitness for Life Program is a fitness program for the developmentally disabled, and as Ms. Cole testified, "it's hard to express all of the benefits of Fitness for Life for the residents of St. Louis Center and people who don't live there."[319] Petitioner allows Fitness for Life participants to exercise at the subject's sister facility in Chelsea completely free of charge.[320] As other examples, the subject has provided use of the gymnasium to the SRSLY group, made the subject available to the Community Read program, and provided the Coalition space at the subject to conduct their meetings 10 times a year, all completely free of charge.[321] All of these are examples of charity provided by Petitioner, clearly bring it within Factor 6 if Factor 3 is not considered. However, the issue of Petitioner's charges for the facility usage raise questions under Factor 3.

". . . occupation is solely for the purposes for which that nonprofit charitable institution was incorporated."

The final requirement under MCL 211.7o is that the occupation is solely for the purposes for which that nonprofit charitable institution was incorporated. For the reasons stated under *Wexford* Factor 2, and 4, it is clear that the subject property is a key part of Petitioner's mission. Accordingly, Petitioner meets this requirement. However, because Petitioner fails to meet Factor 3 under *Wexford*, the Tribunal holds that the subject is not exempt under MCL 211.7o for the years at issue.

JUDGMENT

IT IS ORDERED that the property's state equalized and taxable values for the tax years at issue are as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of

[318] T.4 p.165
[319] T.4 p. 166
[320] T.4 p. 168
[321] T.6 p. 115; T.5 p. 142

equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%, and (iv) after June 30, 2012, through June 30, 2015, at the rate of 4.25%.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

By: David B. Marmon

Entered: April 6, 2016